Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

CHARLES E. SISNEY, *Petitioner*,

v.

TIM REISCH, ET AL., *Respondents*,

AND

UNITED STATES OF AMERICA, *Intervenor*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, prohibits state governments from imposing substantial burdens on prisoners' rights of free religious exercise, even if such burdens result from a rule of general applicability. Section 3 of RLUIPA was enacted pursuant to the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, and RLUIPA creates an express private cause of action to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2. In imposing that condition, Congress expressly defined the term "government" to include the states, state agencies and instrumentalities and state officials. 42 U.S.C. § 2000cc-5(4)(A)(i),(ii). The Fourth, Fifth, Eighth and Eleventh Circuits have concluded that by accepting federal correctional funds, states consent to federal court jurisdiction for at least some form of relief. The difficult and divisive question is whether RLUIPA's express cause of action for appropriate relief effectuates a waiver of the states' Eleventh Amendment immunity against suits for monetary damages arising under Section 3.

The Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000d-7, expressly provides that states shall not be immune under the Eleventh Amendment from suits in federal court for violations of four enumerated antidiscrimination statutes, as well as the "provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). This Court has observed that CRREA, which expressly provides for

remedies both at law and in equity, 42 U.S.C. § 2000d-7(a)(2), is an unambiguous waiver of the states' Eleventh Amendment immunity.

The questions presented are:

1. Whether RLUIPA's express cause of action coupled with CRREA's explicit waiver language is sufficient to permit monetary awards against states. Put differently, do RLUIPA and CRREA furnish clear notice that states accepting federal funds could be subjected to private damages or, instead, as the Eighth Circuit held, is Congress constitutionally required to expressly and unequivocally impose liability for damages in the text of its Spending Clause legislation?

2. Whether CRREA's unambiguous waiver of Eleventh Amendment immunity extends to government-imposed substantial burdens on religious exercise pursuant to Section 3 of RLUIPA or, instead, as the Eighth Circuit held, is CRREA limited to provisions that expressly and unequivocally reference the term "discrimination" in the statutory text?

3. Whether this Court's requirement that a waiver of federal sovereign immunity expressly and unambiguously extend to include monetary damages applies with equal force to determine whether a state federal funding recipient has knowingly and voluntarily waived its Eleventh Amendment immunity in the face of settled law and clearly expressed conditions?

4. Whether the Eleventh Amendment requires Congress to expressly specify each and every form of discrimination in Spending Clause legislation in order to effectuate a waiver pursuant to CRREA?

LIST OF PARTIES

Petitioner is Charles E. Sisney, an inmate at the South Dakota State Penitentiary.

Respondents, in their individual and official capacities, are Tim Reisch, Secretary of Corrections for South Dakota; Douglas L. Weber, Chief Warden for the Department of Corrections of South Dakota; Dennis Block, Associate Warden for the South Dakota State Penitentiary; Jennifer Wagner a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary; and, Daryl Slykhuis, Interim Warden for the South Dakota State Penitentiary.

Intervenor is the United States of America.

James Dean Van Wyhe, an appellee in the circuit court proceedings, is not a petitioner here.

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JURISDICTION

The court of appeals' judgment was entered on September 10, 2009. On December 1, 2009, Justice Samuel A. Alito extended the time to file the petition for writ of certiorari until January 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The Spending Clause in Article I of the United States Constitution provides, in part: "The Congress shall have the Power To . . . provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

II. Statutory Provisions

Section 3 of the Religious Land Use and Institutionalized Person Act (RLUIPA), 42 U.S.C. § 2000cc-1, titled "Protection of religious exercise of institutionalized persons" provides:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> > (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance. . . .
>
> * * * * *

Section 4 of RLUIPA, 42 U.S.C. § 2000cc-2, titled "Judicial relief" provides, in part:

> (a) Cause of action
>
> A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
>
> * * * * *

Section 8 of RLUIPA, 42 U.S.C. § 2000cc-5, titled "Definitions" provides, in part:

> (4) Government
>
> The term "government"—
>
> (A) means—
>
> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law. . . .
>
> * * * * *

The Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000d-7, provides, in part:

> (a) General provision
>
> > (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. §§ 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. §§ 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> > (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.
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> * * * * *

STATEMENT OF THE CASE

I. Factual Background

Enacted in September 2000 for the express purpose of protecting religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, represents "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). By its terms, RLUIPA broadly protects fundamental rights of free religious exercise to the greatest extent the Constitution allows, and categorically prohibits the imposition of government-imposed substantial burdens on religious liberty. 42 U.S.C. § 2000cc-3(g), § 2000cc-1(a)(1)-(2). The only exception to RLUIPA's expansive protective reach is when the government demonstrates that the burden it has imposed furthers a compelling governmental interest, and does so by the least restrictive means. 42 U.S.C. § 2000cc-1(a)(1)-(2).

Section 3 of RLUIPA protects fundamental rights of religious exercise of institutionalized persons: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of general applicability," unless the government proves that the burden furthers a "compelling governmental interest" and does so by the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2).

By its terms, Section 3 of RLUIPA applies with equal force to prohibit substantially burdensome

discrimination and disparate treatment, as well as government-imposed substantial burdens resulting from rules of general applicability. *Id.* Substantial burdens on the religious exercise of institutionalized persons must therefore withstand the most rigorous of scrutiny, even if they result from facially neutral rules.

As this Court has recognized, Section 3 governs state-run institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter*, 544 U.S. at 720-21; 146 Cong. Rec. S7774, S7775 ("Institutionalized residents' right to practice their faith is at the mercy of those running the institution.") RLUIPA thus "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion." *Cutter*, 544 U.S. at 720-21.

Enacted pursuant to the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, and in response to this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997), Section 3 prohibits the imposition of a substantial burden on religious exercise by the government "in a program or activity that receives Federal assistance." 42 U.S.C. § 2000cc-1(b)(1). RLUIPA provides a broad, express private right of action to enforce its substantive protections, and "to obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The term "government" is broadly defined to include:

> (i) a State, county, municipality or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under State law.

Id. § 2000cc-5(4)(A).

RLUIPA expressly contemplates that private enforcement actions may be brought in federal court. 42 U.S.C. § 2000cc-2(a) (standing to bring private cause of action governed by article III of the Constitution); *Id.* § 2000cc-2(c) (restricting full faith and credit for adjudication of some claims in non-federal forum).

Since RLUIPA's enactment, institutionalized persons across the country have invoked Section 3 in private enforcement actions, seeking redress for government-imposed burdens on their fundamental rights of free exercise. Several circuit courts of appeals have construed RLUIPA's broadly-crafted, express remedial provision, and the constitutional scope of RLUIPA's substantive protections. Every circuit court to have considered the question has concluded that Section 3 constitutes a valid exercise of Congress' Spending Clause power, and several circuits have determined that, by voluntarily accepting federal correctional funds in light of RLUIPA's clearly expressed conditions, the states have consented to federal jurisdiction for at least some form of relief.

The difficult and divisive question has been whether RLUIPA's express cause of action for

appropriate relief against the states is sufficiently clear to effectuate a knowing waiver of Eleventh Amendment immunity from monetary damages. On this fundamental question of constitutional and federal law, the circuit courts are deeply and profoundly split, on both the answer and doctrinal approach. The Fourth, Fifth, Sixth, Seventh and Eighth Circuits have declined to find consent absent an express textual waiver of immunity that unambiguously extends to monetary damages. The Eleventh Circuit, employing traditional rules of construction derived from this Court's Spending Clause jurisprudence, has not required an explicit reference to money damages, instead finding knowing consent to all appropriate remedies based on the voluntary acceptance of federal funds in the face of RLUIPA's broad provision for private enforcement and settled presumptions of law.

The Eighth Circuit, here, rejected the Eleventh Circuit's approach, concluding that nothing short of an unequivocal expression of elimination of immunity from private damages in the statutory text could effectuate waiver. The court further refused to find waiver under the Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000d-7(a), concluding that absent an express textual reference to "discrimination," Section 3 was not a federal statute prohibiting discrimination by recipients of federal funds within the scope of that Act. In so finding, the Eighth Circuit solidified a direct and irreconcilable circuit split, and departed from this Court's jurisprudence in profoundly consequential ways.

Petitioner Charles Sisney (Sisney) is an inmate at the South Dakota State Penitentiary, where he is confined for life and practices the Jewish faith. Sisney brought this action against South Dakota prison officials in their individual and official capacities asserting claims of governmental interference with his rights of free religious exercise under RLUIPA and the Constitution.[1] Pet. App. 43a-46a. Sisney invoked Section 3 of RLUIPA, challenging the prison officials' repeated denials of his requests for religious accommodation on the basis that the unjustified denials substantially burdened his fundamental rights of free religious exercise. Over a period of years, Sisney made several formal requests, which were denied.

Of relevance here, Sisney sought to celebrate the seven-day Jewish festival of Sukkot, in accordance with the dictates of his faith, by taking his meals outdoors in a succah booth. Pet. App. 82a-88a. Sisney did not have a succah booth, and he did not ask the prison to acquire one. Rather, inmates at another South Dakota prison donated a small booth for Sisney and other Jewish inmates to use.[2] Pet. App. 82a.

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1 Sisney also claimed retaliation and constitutional violations, which are not at issue here. Pet. App. 38a-39a.

2 A succah is a three-sided covered booth, in which individuals who practice Judaism eat their meals during Sukkot, a religious festival of thanksgiving commemorating the temporary shelter of the Jews during their wandering in the wilderness. Pet. App. 33a, 82a.

Sisney requested to use the booth during the week of Sukkot in 2003, but his request was denied. Pet. App. 82a-83a.

In 2004, Sisney renewed his request, and again asked to celebrate Sukkot by taking his lunch meals outdoors in the succah for seven days. Pet. App. 83a. The prison refused on grounds of security, and that prison policy prohibits the transfer of property between inmates. Pet. App. 83a-85a. In denying Sisney's request, the associate warden compared the succah to the prison's Native American sweatlodge, which is maintained in the recreation yard and used year-round by hundreds of Native American inmates. According to the warden, the succah posed a security risk, in part, because inmates are shielded from view and, unlike the sweatlodge (a fully-enclosed, permanent structure), the succah is temporary and can be easily destroyed. Pet. App. 84a. In lieu of allowing the succah, the prison granted the Jewish inmates 30 minutes during each day of Sukkot to gather in the Phone Room to recite blessings. Pet. App. 85a.

Sisney also requested to celebrate in the succah during the week of Sukkot in 2005, and again in 2006. Pet. App. 85a. Both requests were denied.

Independently, Sisney sought additional time to gather with other Jewish inmates for group Torah, Kabalistic and Hebrew language studies. Pet. App. 91a-92a. Sisney requested more time for his religious studies because, he asserted, the regularly scheduled twice-weekly services were inadequate because they were dedicated to worship, and left no time for group study of religious texts. Pet. App. 91a. Sisney's

request noted that other religious groups were allowed significantly more time for weekly services, including 6 periods per week for Native Americans, 10 periods per week for Catholics and 8 periods per week for Christians. Pet. App. 91a. When the associate warden denied Sisney's request, he did so by stating: "You have ample time during Shabbat Service to study Torah." Pet. App. 92a.

Finally, Sisney sought to use and possess a tape player so that he could study Hebrew in his cell.[3] Pet. App. 97a-98a. Sisney's request was denied on the basis that no inmates of any faith are permitted to possess tape players in their cells. *Id.*

Sisney engaged the prison grievance process, and informed prison policymakers about the discriminatory and burdensome treatment Sisney believed he received. Pet. App. 50a. Sisney's requests for administrative remedy were denied, and no formal action was taken to ensure his religious rights were not unlawfully restricted. Pet. App. 50a-51a.

In response, Sisney brought this action in the United States District Court for the District of South Dakota challenging the denials as discriminatory and substantially burdensome in violation of RLUIPA, and seeking injunctive and monetary relief. Pet. App. 46a.

II. District Court's Opinion

The prison officials sought summary judgment asserting qualified immunity and Eleventh

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[3] Sisney advanced other RLUIPA challenges, which are not at issue here. Pet. App. 89a-102a.

Amendment immunity, and challenging the constitutionality of RLUIPA on various grounds. Pet. App. 42a-43a. The United States intervened for the purpose of opposing the constitutional challenge. The district court denied summary judgment, upholding the constitutionality of RLUIPA as a valid exercise of Congress' Spending Clause power, and rejecting the balance of the officials' constitutional claims.[4] Pet. App. 102a-112a. The court granted summary judgment on the individual capacity claims, finding that RLUIPA was enacted pursuant to the Spending Clause; thus, Congress was precluded from subjecting non-recipients of federal funds to private liability. Pet. App. 58a-61a.

On the Eleventh Amendment question, the district court denied summary judgment, concluding that RLUIPA's remedial provision for "appropriate relief" expressly permits recovery of monetary damages and, that by accepting federal correctional funds, South Dakota waived its immunity from suits for monetary damages under CRREA. Pet. App. 57a-58a.

In a comprehensive and detailed opinion, the district court examined this Court's Spending Clause jurisprudence and considered the split in authority between the Fourth and Eleventh Circuits on the question whether the text of RLUIPA's private right of action is sufficiently clear to effectuate a waiver of Eleventh Amendment immunity from suits for damages. The court weighed the Fourth Circuit's approach, and agreed that mere participation in a federal funding program is insufficient to waive

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[4] The district court upheld RLUIPA against other constitutional challenges not relevant here. Pet. App. 112a.

immunity. Pet. App. 64a-66a. The court concluded that RLUIPA's reference to "appropriate relief" failed to unambiguously require waiver of Eleventh Amendment immunity for monetary damages as a condition of accepting funds. Pet. App. 67a-70a.

Finding the absence of an unequivocal waiver in the text of RLUIPA was not dispositive on the question of immunity, the district court considered whether RLUIPA falls within the scope of CRREA – a statute, which explicitly declares that a State shall not be immune under the Eleventh Amendment from suits for violations of a federal statute prohibiting discrimination by federal funding recipients. In rejecting the Fourth Circuit's strict construction requiring an express textual reference to "discrimination," the district court found RLUIPA was a statute prohibiting discrimination by federal funding recipients under CRREA. Pet. App. 70a-72a.

Recognizing that "[t]he right to exercise one's religion is clearly a fundamental freedom," and observing that Congress found "prison officials were discriminating against prisoners who sought to exercise their religious beliefs," the district court concluded that RLUIPA was enacted, in part, "to prohibit discrimination by prison officials against prisoners who desire to exercise their religious beliefs." Pet. App. 71a. In so finding, the court invoked the Seventh Circuit's observation that: "RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement of fundamental freedoms.'" Pet. App. 71a (quoting *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (quoting *Mayweathers v. Newland*,

314 F.2d 1062, 1066-67 (9th Cir. 2002)). Thus, according to the court, South Dakota waived its immunity from monetary damages under CRREA by accepting federal funds. Pet. App. 72a.

Turning to the scope of the waiver, the district court examined whether RLUIPA authorizes monetary damages. Acknowledging that the Fourth and District of Columbia Circuits have recognized that RLUIPA could be read to extend to damages, the court agreed with the Eleventh Circuit's decision in *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007), that in light of the presumption this Court accords such remedial language, RLUIPA's express right of action "to obtain appropriate relief against a government" is broad enough to encompass the right to recover monetary damages for statutory violations. Pet. App. 72a-73a. In so doing, the court adopted the Eleventh Circuit's reasoning that in using the broad, general language of "appropriate relief" in RLUIPA, Congress was aware of the "presumption in favor of making all appropriate remedies available to the prevailing party," established by this Court in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992), and its progeny. Pet. App. 73a (citing *Smith*, 602 F.3d at 1270-71). Congress could have, but chose not to, limit remedies to injunctive relief. In light of the *Franklin* presumption, and absent an expressed contrary intent, the court concluded that RLUIPA encompasses claims for monetary relief. Pet. App. 73a.

The court further concluded that even if RLUIPA lacked an express, broad remedial provision, this Court's decision in *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), authorizes recovery of compensatory damages. According the district court, RLUIPA was

enacted under Congress' Spending Clause power and, in discussing the permissible scope of remedies for which funding recipients may be held liable in Spending Clause legislation, this Court observed:

> A funding recipient is generally on notice that it is subject to those remedies traditionally available in suits for breach of contract. Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages and injunction, forms of relief traditionally available in suits for breach of contract.

Pet. App. 73a-74a (quoting *Barnes*, 536 U.S. at 187).

Following *Barnes*, the district court concluded that where Congress did not expressly preclude monetary damages in RLUIPA, South Dakota was on notice that it is subject to that remedy "because an award of compensatory damages is a form of relief traditionally available in suits for breach of contract." Pet. App. 74a.

Turning to the merits of the RLUIPA claims, the court denied summary judgment in relevant part, finding Sisney demonstrated a substantial burden on his free exercise rights regarding the prison officials' denial of his requests to celebrate Sukkot in the succah, engage in group religious text studies, and use a tape player in his cell for Hebrew language studies. Pet. App. 85a-98a. In rejecting the prison officials' proffered justifications, the district court questioned the neutrality of the stated interest and noted evidence

of unequal treatment. Pet. App. 86a-88a (questioning legitimacy of security concerns asserted as grounds for denying succah where Native American sweatlodge posed similar, or greater threat); *id.* 92a-94a (factual issues where non-Jewish religions were provided more worship time than Jewish inmates, and were allocated separate time for group religious text studies).

Regarding the tape player, the court rejected the contention that the facially neutral policy justified the denial because RLUIPA prohibits substantial burdens on religious exercise, even if they result from rules of general applicability. Pet. App. 97a-98a.

III. Eighth Circuit's Opinion

The Eighth Circuit affirmed the district court's conclusion that RLUIPA is a constitutional exercise of Congress' Spending Clause power, but reversed the denial of summary judgment on Eleventh Amendment grounds. Pet. App. 22a-30a. The United States intervened to support RLUIPA's constitutionality.

In finding Section 3 constitutional, the Eighth Circuit determined that a state prison receiving funds under RLUIPA does so on two conditions: (1) that prison officials not impose a substantial burden on an inmate's free exercise unless the burden is justified by a compelling state interest achieved through the least restrictive means, and (2) that the state must submit to judicial proceedings for "appropriate relief" to enforce RLUIPA. Pet. App. 16a. In so concluding, the Eighth Circuit found that RLUIPA unambiguously conditions federal funds on the states' consent to provide heightened religious protection to inmates, and to submit to private enforcement actions. Pet. App. 17a-19a.

Recognizing Congress' interest in protecting inmates' religious exercise and power under the Spending Clause provide greater protection for religious exercise beyond what the Constitution requires, the Eighth Circuit joined the Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits in upholding the constitutionality of RLUIPA. Pet. App. 22a-23a.

In considering the Eleventh Amendment challenge, the Eighth Circuit expressly acknowledged Congress' power under the Spending Clause to condition federal funds on the states' waiver of sovereign immunity, and again recognized that, in RLUIPA, Congress conditioned the acceptance of funds on the states' consent to "appropriate relief." Pet. App. 23a-25a. In so finding, the court reiterated that RLUIPA expressly creates a private right of action "'for at least some form of relief'" (Pet. App. 25a (quoting *Madison v. Virginia*, 474 F.3d 118, 130 (4th Cir. 2006)), and that the phrase "appropriate relief," is "broad enough to include both injunctive relief and compensatory damages." *Id.*

But while these conditions are sufficiently clear to overcome a Spending Clause challenge, the court required that such language must also "*unambiguously* extend[] to monetary claims" in order to effectuate a waiver of Eleventh Amendment immunity. Pet. App. 25a. In adopting this rule, the Eighth Circuit relied on *Lane v. Pena*, 518 U.S. 187, 192 (1996), a case in which this Court, construing the sufficiency of Congress' abrogation of the federal government's sovereign immunity stated: "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend

unambiguously to such monetary claims." *Id.* The Eighth Circuit did not purport to consider *Barnes*, or this Court's related Spending Clause jurisprudence.

Instead, the court relied exclusively on *Lane* – a decision, which did not involve Spending Clause power or the states' knowing consent to statutory conditions, and which the Eighth Circuit categorically characterized as "reject[ing] any idea that sovereign immunity could be waived by anything other than the 'unequivocal expression of elimination of sovereign immunity . . . in statutory text.'" Pet. App. 26a-27a (quoting *Lane*, 518 U.S. at 192 (internal citations omitted). Thus, according to the Eighth Circuit, notwithstanding that a state has voluntarily consented to "adhere to RLUIPA's heightened substantive requirements and to submit to private enforcement actions for appropriate relief, which could include compensatory damages, (and notwithstanding that such conditions are constitutionally imposed), absent an unequivocal express textual reference to monetary damages, that state's consent extends solely to injunctive relief.

In so finding, the Eighth Circuit acknowledged a direct conflict among the circuit courts of appeals, which has now become deeply entrenched, with the Fifth, Sixth, Seventh and Eighth Circuits following the Fourth Circuit's decision in *Madison v. Virginia*, 474 F.3d at 130, which, like the Eighth Circuit here, imported this Court's rule in *Lane* governing statutory abrogation of the federal government's sovereign immunity to conclude that RLUIPA's "appropriate relief" language "'falls short of the unequivocal textual expression necessary to waive the State immunity from suits for

damages.'" Pet. App. 25a-26a (quoting *Madison*, 474 F.3d at 130 and citing circuit cases).

In further solidifying the circuit split, the Eighth Circuit categorically rejected the Eleventh Circuit's decision in *Smith v. Allen*, 502 F.3d at 1271, which held "that, absent an intent to the contrary, the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief," and its concomitant reliance on this Court's decision in *Franklin*, 503 U.S. 60. Pet. App. 26a. The Eighth Circuit acknowledged *Franklin's* articulation of a presumption in favor of making *all* appropriate remedies available when Congress employs broad remedial language in a Spending Clause statute, but refused to extend that rule to the remedial language in RLUIPA. According to the Eighth Circuit, *Franklin* does not apply because it did not involve the question of state sovereign immunity, and this Court had no occasion to squarely consider whether statutory language at issue was specific enough to effectuate a knowing waiver. Pet. App. 26a-27a.

The Eighth Circuit, again following *Madison*, applied the same rationale to conclude that Section 3 of RLUIPA is not a "Federal statute prohibiting discrimination by recipients of Federal financial assistance" within the meaning of CRREA. Pet. App. 28a. Requiring an express textual reference to the word "discrimination," the court found that Section 3 does not "unambiguously prohibit discrimination – it prohibits substantial burdens on religious exercise, without regard to discriminatory intent." *Id.* The court noted that Section 2 of RLUIPA, in contrast to Section 3, expressly prohibits discrimination and unequal treatment, and that

all the civil rights statutes enumerated in CRREA (Title IX, Title VI, the Age Discrimination Act and the Rehabilitation Act) reference discrimination as well. Again, without considering *Barnes* or the clear notice requirement applicable to Spending Clause legislation, and without construing the substantive text of Section 3 and its strict scrutiny standard, the Eighth Circuit concluded that "[a]bsent an unequivocal textual indication that CRREA applies to Section 3," CRREA does not "effectuate a knowing waiver of sovereign immunity from money damages on those claims." Pet. App. 29a-30a.

On the merits of the RLUIPA claims, the court of appeals affirmed the district court's denial of summary judgment, finding that Sisney established that the denial of his request to use a succah – "'a mandatory part of the Sukkot Festival' and essential to the practice of [Sisney's] Jewish faith" imposed a substantial burden on his religious exercise under RLUIPA. Pet. App. 33a-34a. The court of appeals reversed summary judgment on the two surviving claims for injunctive relief and remanded for judgment in favor of the prison officials. Pet. App. 34a-37a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT AND IRRECONCILABLE CONFLICT AMONG THE CIRCUITS ON WHETHER RLUIPA CONSTITUTIONALLY EFFECTUATES A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FROM MONETARY DAMAGES

The Eighth Circuit's sweeping conclusion that Congress cannot constitutionally exercise its Spending Clause power to condition federal funds on consent to suits for monetary damages absent anything other than an unequivocal expression of elimination of immunity from damages solidifies an intractable and irreconcilable conflict among the circuit courts of appeals, which only this Court can resolve. In limiting the scope of RLUIPA's remedial provision, the Eighth Circuit acknowledged the deeply entrenched split among the circuits on this critical question, with the Fourth, Fifth, Sixth and Seventh Circuits holding that RLUIPA does not effectuate a waiver of immunity against suits for monetary damages, and the Eleventh Circuit holding that RLUIPA does effectuate a waiver. *Compare Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009), *Sossamon v. Texas*, 560 F.3d 316 (5th Cir. 2009), and *Madison*, 474 F.3d 118, *with Smith*, 502 F.3d 1255.[5]

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[5] Petitions for writ of certiorari are pending in two of these cases – *Sossamon v. Texas*, Docket No. 08-1438, and *Cardinal v. Metrish*, Docket No. 09-109. This Court invited briefing from the Solicitor General to express the United States' views in both cases.

In *Madison*, 474 F.3d at 129-32, the Fourth Circuit construed RLUIPA to create an express private right of action to obtain appropriate relief against the government, including states, and determined that because Virginia had clear notice of this condition, "[b]y voluntarily accepting federal correctional funds, it consented to federal jurisdiction for at least some form of relief." *Id.* at 130 (citing *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) ("[State] was on clear notice that by accepting federal funds for its prisons, [it] waived its immunity from suit under RLUIPA."). According to the Fourth Circuit, however, that RLUIPA unambiguously conditions federal funds on consent to suit in federal court is insufficient to waive full immunity absent an express textual reference to monetary relief.

The Fourth Circuit did not purport to consider this Court's decisional law governing Congress' power to effectuate a waiver a Eleventh Amendment immunity from suit through clearly noticed conditions in Spending Clause legislation, and it failed to expressly consider this Court's decisions in *Franklin* and *Barnes*. Instead, relying exclusively on the rules that apply when Congress waives the federal government's sovereign immunity, the Fourth Circuit required an unequivocal textual waiver that extends unambiguously to monetary claims. *See id.* at 131-32 (citing *Lane*, 518 U.S. at 192 ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."); *United States v. Nordic Village*, 503 U.S. 30, 34 (1992) (refusing to imply waiver of federal immunity from money damages absent an "unequivocal

expression" in text where statute could be read either to include, or preclude damages); *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (finding "appropriate relief" provision of RFRA insufficient to waive federal immunity from damages suits because the "broad term" might include damages, or, plausibly, might not)). The court concluded that because "appropriate relief" is susceptible of more than one interpretation, it failed to constitute an unequivocal textual waiver of immunity extending unambiguously to money damages.[6] *Id.* at 132.

In *Smith*, 502 F.3d at 1269-71, the Eleventh Circuit, noting the division of authority took an entirely different approach and reached the opposite conclusion. Following the rule in *Franklin*, 503 U.S. at 68-69, that absent express congressional intent to the contrary, federal courts should presume the availability of *all* appropriate remedies, the Eleventh Circuit found RLUIPA's "appropriate relief" provision broad enough to encompass monetary damages and effectuate waiver. The question presented in *Franklin* was whether the

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6 *Madison's* reliance on *Shea v. County of Rockland*, 810 F.2d 27, 29-30 (2d Cir. 1987) for the proposition that "appropriate relief" ordinarily includes injunctive and equitable relief, contravenes the presumptions accorded by *Franklin* and *Barnes*, and it could be misleading. The provision at issue in *Shea* referenced "appropriate relief" exclusively in terms of injunction and reinstatement. In contrast, RLUIPA broadly authorizes, without express or implied limitation, the private right to obtain "appropriate relief" against the states. The only limitations run against the United States, whose remedies are expressly limited to declaratory and injunctive relief. 42 U.S.C. § 2000cc-2(f).

implied right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, supported a claim for monetary damages in light of the longstanding rule that absent clear direction to the contrary by Congress, federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. In finding a right to damages, this Court noted the traditional rule that "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin*, 503 U.S. at 69.

Of particular significance in *Franklin* (although not noted in *Smith*), was the fact that Congress enacted CRREA (which expressly waived Eleventh Amendment immunity from suits arising under Title IX) *after* this Court implied a private right of action, but Congress failed to expressly limit the available remedies. Having failed in the face of an implied right of action to abrogate the traditional presumption in favor of any appropriate relief, this Court presumed that Congress enacted CRREA with the traditional presumption in mind.[7] *Franklin*, 503 U.S. at 72-73; *id.* at 78 (Scalia, J., concurring) (stating CRREA was an "implicit acknowledgement that damages are available.").

Following *Franklin*, the Eleventh Circuit thus presumed Congress was aware of the traditional presumption when, in enacting RLUIPA, Congress

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[7] Notably, while CRREA references "remedies both at law and in equity," it does not unequivocally, or even expressly, reference compensatory damages. 42 U.S.C. § 2000d-7(a)(2).

expressed no intent to limit the remedies for statutory violations and, instead, employed broad language authorizing private enforcement actions with the right to obtain "appropriate relief." *Smith*, 502 F.3d at 1270-71; *id.* at 1276 n.12; *see also Benning*, 391 F.3d at 1305-06 (noting RLUIPA expressly defines "government" to include states and state agencies; thus, "Georgia was on clear notice that by accepting federal funds for its prisons, Georgia waived its immunity from suit under RLUIPA."); *id.* at 1306 (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003) ("Where Congress has unambiguously conditioned the receipt of federal funds on a waiver of immunity, . . . a state can [not] continue to accept federal funds without knowingly waiving its immunity.")).

In *Sossamon*, 560 F.3d 316, the Fifth Circuit, noting the split in authority, sided with the Fourth Circuit and concluded that "RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief." *Id.* at 331. In finding that RLUIPA was unclear regarding the scope of states' liability for violations, the Fifth Circuit adopted the rule in *Madison* that waiver must textually and unambiguously extend to monetary claims. In rejecting the Eleventh Circuit's rule, the Fifth Circuit summarily concluded that the *Franklin* presumption "disappear[s]" in the face of an ambiguous provision involving immunity: "We may not presume the [traditional rule] when we ask whether a state knowingly waived its immunity from damages when damages are not *expressly provided*." *Id.* at 331.

The Fifth Circuit cited no decision from this Court, or any other, limiting the scope and reach of *Franklin*.

In *Cardinal*, 564 F.3d 794, the Sixth Circuit, noting the lack of consensus among the circuit courts, surveyed the holdings of *Madison*, *Smith* and *Sossamon* and ultimately sided with the Fourth Circuit to require an "unequivocal expression" of liability for damages. *Id.* at 799-801. Invoking *Lane* and *Nordic Village*, the Sixth Circuit required an unequivocal expression of waiver against suits for monetary damages. In declining to follow *Franklin*, the Sixth Circuit stated: "The Supreme Court has recognized that *Franklin* is not per se applicable to all claims against a State, but only to claims in which a State has expressly waived its sovereign immunity." *Id.* at 800-01 (citing *Lane*, 518 U.S. at 196-97). But *Lane* created no such rule as against states in the Eleventh Amendment context, and it did not purport to limit *Franklin* in cases where Congress creates an express right of action to enforce a federal statute. *See id.* at 197-98. *Lane* did not involve state defendants, or a challenge to the scope of appropriate remedies. In considering when the *federal* government expressly consents to damages in a federal statute, *Lane* held: "Where a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Id.* at 196-97.

In *Nelson*, 570 F.3d 868, the Seventh Circuit, noting the division of authority, sided with the Fourth and Fifth Circuits. Turning *Franklin* on its head, the Seventh Circuit agreed that by employing the phrase "appropriate relief," Congress necessarily foreclosed any

argument that RLUIPA waives immunity from damages, and that the *Franklin* presumption simply does not apply in the Eleventh Amendment context. The Seventh Circuit summarily concluded: "damages must be 'expressly provided' in the statute in order for a court to find that a state has waived immunity to such suits." *Id.* at 884 (quoting *Sossamon*, 560 F.3d at 331). In importing the express waiver requirement, the Seventh Circuit, like its predecessors, failed to consider *Barnes*, or this Court's Spending Clause jurisprudence.

This Court should not tolerate a split among the circuit courts on such a critical issue as the Eleventh Amendment – particularly, where, as here, the enforcement of a federal civil rights statute involving fundamental rights of religious freedom is at issue.

The Eighth Circuit, here, in adopting *Madison*, rejecting *Smith* and *Franklin*, and importing *Lane* to create a categorical rule that Congress cannot effectuate a waiver of monetary relief in Spending Clause legislation absent an express unequivocal reference to damages solidifies an entrenched and intractable conflict among the circuit courts of appeals. This split in circuit authority reflects profoundly disparate approaches on the fundamental question of state sovereignty, and the intersection between the Eleventh Amendment and Congress' Spending Clause power. The conflict is irreconcilable, and cannot be resolved without intervention by this Court. Uniformity and clarity on the question of immunity are critical, particularly, given RLUIPA's long history and Congress' repeated attempts to constitutionally effectuate RLUIPA's intended purpose to broadly protect religious liberty.

The Eighth Circuit's categorical rule requiring express waivers for damages substantially limits the scope of RLUIPA's private right of enforcement and potentially implicates all remedial Spending Clause legislation that seeks to condition federal funding on consent to private suits. This Court has not required that Congress expressly reference monetary relief when conditioning federal funds, nor expressed that a textual reference to damages is necessary to secure states' voluntary and knowing consent to suit. This Court has not imported *Lane* to limit Congress' Spending Clause power vis-à-vis the states, or to alter its Eleventh Amendment jurisprudence. Nor has it repudiated *Franklin* when construing the scope of the states' consent to suit in Spending Clause programs. Yet, circuit courts continue to adopt *Madison* and its progeny without independent scrutiny or reservation.

The Eighth Circuit's rule precludes damages for *any* violation of RLUIPA, whether it arises under Section 2 or Section 3, and regardless of whether an intentional discriminatory violation of RLUIPA has been established. If, too, individual capacity suits are indeed foreclosed by the Spending Clause, institutionalized persons subjected to discriminatory deprivations of religious liberty, whose right to practice their faith is at the mercy of the state, have no meaningful recourse against state officials who, undeterred until the eleventh hour, unilaterally render an inmate's action moot.

Five circuits have acknowledged the division in authority on this critical question, and this Court should not tolerate continuing disparity and uncertainty. This petition joins two others pending before the Court, each

seeking resolution on this important federal question. This Court should heal the breach, and clarify whether Congress is constitutionally required to expressly reference damages in effectuating a waiver pursuant to the Spending Clause, so that the lower federal courts and, if necessary, Congress, can respond accordingly.

II. THE EIGHTH CIRCUIT'S DECISION CONTRAVENES *BARNES* AND *FRANKLIN*, AND OTHER DECISIONS OF THIS COURT

In requiring an unequivocal express textual reference to monetary damages, the Eighth Circuit directly contravened *Barnes v. Gorman*, 536 U.S. 181 (2002), and other decisions of this Court. It is true that a state does not automatically waive its immunity merely by accepting federal funds. But it is equally true that a state's acceptance of federal financial assistance in the face of a condition clearly expressed by Congress may give rise to a waiver of Eleventh Amendment immunity, even in the absence of any express statement of waiver by the state or its legislature. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985).

This Court has long recognized Congress' power to impose conditions on states when it legislates pursuant to the Spending Clause and, that unlike legislation enacted under the Fourteenth Amendment, Spending Clause legislation is much in the nature of a contract. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts"

the contract's terms. *Id.* When Congress imposes a condition it must, of course, do so unambiguously. *Id.*

The question in determining whether Congress has unambiguously conditioned federal funds is whether the statute "furnishes clear notice regarding the liability at issue." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). While states cannot consent to conditions for which they are unaware or unable to ascertain, liability will attach if, the state official engaged in the funding process "would clearly understand" the scope of the state's obligations.[8] *Id.*

Still, this Court has routinely applied a contract-law analogy in defining the scope of conduct for which state funding recipients may be liable for monetary awards, and in finding a damages remedy for private enforcement actions under Spending Clause legislation. *See, e.g.*, *Barnes*, 536 U.S. at 186 ("We have repeatedly characterized [Title VI] and other Spending Clause legislation as 'much in the nature of a *contract*: in return

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[8] This notice requirement, which applies where states voluntarily participate in federal funding programs, requires Congress to "manifest[] a clear intent to condition participation in the programs funded under the [statute] on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247. This is distinct from the "unequivocal expression" of an "unmistakable congressional purpose" this Court requires when Congress abrogates immunity of non-consenting states under the Fourteenth Amendment, *id.* at 239, 242-47, and from the test this Court applies when states voluntarily through constitutional or statutory provisions waive their immunity by "'the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction,'" *id.* at 239-40 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

for federal funds, the [recipients] agree to comply with federally imposed conditions." (quoting *Pennhurst*, 451 U.S. at 17)). The touchstone is notice: funding recipients must have clear notice that they could be held liable.

In *Barnes*, this Court considered the general rule stated in *Franklin* that "'absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief'" for violation of a federal right, and *Franklin's* finding of a private damages remedy. 536 U.S. at 184 (quoting *Franklin*, 503 U.S. at 70-71). Applying the contract-law analogy to determine the proper scope of that remedy, this Court held that a remedy is appropriate relief under *Franklin*, "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (emphasis in original). The Court stated:

> A funding recipient is generally *on notice that it is subject . . . to those remedies traditionally available in suits for breach of contract.* Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is *nevertheless subject to suit for compensatory damages*, and injunction, forms of relief traditionally available in *suits for breach of contract.*

Id. (citations omitted) (emphasis added).

Here, the Eighth Circuit recognized that RLUIPA unambiguously conditions federal funds on the state's consent to provide heightened religious protection to inmates, and to submit to private enforcement actions in federal court, and that the phrase

"appropriate relief," is "broad enough to include both injunctive relief and compensatory damages." Pet. App. 25a. Based on this construction, and under *Barnes*, *Franklin* and *Pennhurst*, a state has adequate notice that it could be liable for damages for, *at least*, an intentional violation of RLUIPA. *See, e.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999) ("*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute."). In requiring an express textual reference to monetary damages, the Eighth Circuit contravened this Court's Spending Clause jurisprudence.[9]

III. THE EIGHTH CIRCUIT CONTRAVENES THIS COURT'S DECISIONS GOVERNING FREE EXERCISE AND DISCRIMINATION, AND OTHER CIRCUIT COURT DECISIONS

CRREA provides, in part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the

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[9] *Lane*, 518 U.S. 187, does not mandate otherwise. That case involved an express statutory waiver of *federal* sovereign immunity and did not purport to repudiate *Pennhurst*, *Franklin* or *Atascadero* in the Eleventh Amendment context. *Lane* did not involve a challenge to the scope of a private remedy – rather, this Court refused to find waiver because the respondent (an executive agency) was not a "Federal provider of financial assistance" within the meaning of the Rehabilitation Act. *Id.* at 195.

> Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other *Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. § 2000d-7(a)(1) (emphasis added).

Every circuit that has considered the question has held that CRREA "unambiguously conditions a state agency's acceptance of federal funds on its waiver of Eleventh Amendment immunity." *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1164 & n.1 (D.C. Cir. 2004). This Court, too, albeit in dictum, has concluded the same. *Lane*, 518 U.S. at 200.

Patterned after longstanding federal anti-discrimination legislation enacted pursuant to the Spending Clause, RLUIPA, by its plain terms, is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a).

In requiring that Section 3 contain an express reference to the term "discrimination" as a condition of finding a clear statement of waiver, the Eighth Circuit contravened this Court's decisions construing the Free Exercise Clause, antidiscrimination law and RLUIPA.

This Court has recognized that Section 3 of RLUIPA prohibits discrimination by prison officials against prisoners on the basis of their religion, and that RLUIPA affords even greater protections to institutionalized persons than what the Constitution requires. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional

efforts to accord religious exercise heightened protection from government-imposed burdens"). RLUIPA protects the religious liberty of those confined to state-run institutions in which, as this Court observed: "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Id.* at 720-21 (RLUIPA "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion.").

In hearings spanning three years, Congress documented that "frivolous or arbitrary" barriers impeded the religious exercise of institutionalized persons. *See* 146 Cong. Rec. S7774, S7775 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."); *Cutter*, 544 U.S. at 716 & n.5 (reciting instances of nationwide disparate treatment by state prison officials of inmates on the basis of their religion).

Thus, "[t]o secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from [the Religious Restoration Freedom Act] the 'compelling governmental interest'/'least restrictive means' standard." *Cutter*, 544 U.S. at 716-17. In so doing, Congress through RLUIPA mandated a more searching standard of review for free exercise burdens than the Constitution itself affords. *Cf. Turner v.*

Safley, 482 U.S. 78, 89 (1987) (prison rules of general applicability upheld against free exercise challenge if reasonably related to legitimate penological interest).

Indeed, the entire purpose of RLUIPA was to provide heightened protection against government-imposed burdens on free religious exercise, and to require the government to satisfy strict scrutiny to justify such burdens – *regardless* of whether they result from intentional discrimination or facially neutral rules of general applicability. *See generally Cutter*, 544 U.S. at 714-17 (discussing *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 878-87 (1990), 42 U.S.C. § 2000bb *et seq.*, and *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997)); *see also* 42 U.S.C. § 2000bb(a)(2) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."); *id.* § 2000bb(b)(1) (restoring pre-*Smith* compelling interest test and "to guarantee its application in all cases where free exercise of religion is substantially burdened").[10]

By its terms, Section 3 categorically prohibits the imposition of substantial burdens on religious exercise:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of [title 42], *even if the burden results from*

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10 While no longer applicable against the states, the substantive provisions in 42 U.S.C. § 2000bb-1 mirror those in Section 3 and were incorporated therein. *Cutter*, 544 U.S. at 717.

> *a rule of general applicability*, unless the government demonstrates that imposition of the burden on that person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a)(1),(2) (emphasis added).

By its terms, Section 3 bans *all* substantial burdens, whether they result from intentional discrimination or general rules of applicability. The only exception to this broad prohibition applies when strict scrutiny is satisfied. That Section 2 expressly references discrimination does not narrow the categorical scope of Section 3. Indeed, it reinforces the plain fact that Section 3 bans all burdens, whether discriminatory in purpose, or in effect.

In recognizing that RLUIPA provides heightened protection, this Court has implicitly acknowledged what the plain text of Section 3 makes clear – namely, that the Free Exercise Clause is a constitutional floor, not a ceiling. *See Cutter*, 544 U.S. at 714. To be sure, the Constitution unequivocally prohibits intentional government-imposed discrimination on the basis of religion or religious exercise. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-34, 542-43, 546 (1993); *Sherbert v. Verner*, 374 U.S. 398, 402-06 (1963); *Cruz v. Beto*, 405 U.S. 319, 322 (1972). And, in requiring all government-imposed

substantial burdens to withstand strict scrutiny, Congress plainly raised the constitutional floor to treat any burden on the fundamental right of free exercise as discrimination. *See, e.g., Church of the Lukumi Babalu*, 508 U.S. at 546; *Smith*, 494 U.S. at 885-86 & n.3.

Circuit courts, too, recognize that RLUIPA provides greater protection than the Constitution requires, and that Section 3 prohibits, *at least*, discrimination. *See Lovelace v. Lee*, 472 F.3d 174, 185-88, 194-95 (4th Cir. 2006); *Warsoldier v. Woodford*, 418 F.3d 989, 994-97 (9th Cir. 2005); *see also Truth v. Kent Sch. Dist.*, 542 F.3d 634, 646 (9th Cir. 2008); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008); *but see Madison*, 474 F.3d at 133 (no CRREA waiver where no express ban on discrimination). Even under *Turner's* deferential standard, neutrality is constitutionally required. *Turner*, 482 U.S. at 90-91; *Mayfield v. Texas Dep't of Crim. Just.*, 529 F.3d 599, 610 (5th Cir. 2008).

The Eighth Circuit's decision further conflicts with the Sixth, Seventh and Ninth Circuits, which, in upholding RLUIPA as a constitutional exercise of Congress' Spending Clause power, expressly characterize RLUIPA as antidiscrimination legislation. The Ninth Circuit held:

> The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting religious worship from impermissible government intrusion. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line

> with this positive constitutional value. Moreover, *by fostering non-discrimination*, RLUIPA follows a long tradition of federal legislation *designed to guard against unfair bias and infringement on fundamental freedoms*.

Mayweathers v. Newland, 314 F.3d 1062, 1066-67 (9th Cir. 2002) (citing Titles VI, VII, IX) (emphasis added).

Following the Ninth, the Seventh Circuit observed that Titles VI and VII of the Civil Rights Act of 1964 "protect against numerous forms of discrimination," and that Title IX sought to "eliminate gender inequities in education," and ultimately concluded that in RLUIPA, "Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties." *Charles v. Verhagen*, 348 F.3d 601, 607-09 (7th Cir. 2003); *accord Cutter v. Wilkinson*, 423 F.3d 579, 587 (6th Cir. 2005); *Benning*, 391 F.3d at 1306-07.

Finally, this Court has recognized that discrimination manifests in many forms, even if only in effect. *See Ricci v. DeStefano*, __ U.S. __, 129 S. Ct. 2658, 2672-75 (2009); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). This Court has not required Congress to use magic words in analogous antidiscrimination statutes, or to specify every form of discrimination a statute prohibits, before states will be charged with clear notice of potential liability. *See Jackson v. Birmingham Bd. of. Educ.*, 544 U.S. 167, 171-84 (2005); *id.* at 173-75 ("discrimination" covers a wide range of intentional unequal treatment; thus, retaliation is discrimination

because person is "subjected to differential treatment"); *Davis*, 526 U.S. at 635-45, 649-51 (sexual harassment is discrimination under Title IX and satisfies *Pennhurst*).

In so doing, this Court has rejected overly formalistic constructions and has looked instead to the plain meaning of a statute's broad prohibition. *See Gomez-Perez v. Potter*, __ U.S. __, 128 S. Ct. 1931, 1935-39 (2008) (finding broad antidiscrimination ban plainly included retaliation, and relying on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding cause of action for retaliation based on plain meaning of 42 U.S.C. § 1982, despite absence of term "discrimination")).

In requiring an express reference to "discrimination," the Eighth Circuit imposed a higher burden than clear notice requires and created an anomalous and uncertain rule. RLUIPA's broad proscription plainly includes intentional infringement of religious freedom. If the antidiscrimination purpose of RLUIPA is sufficiently clear to support a constitutional exercise of Congress' power, then it should be sufficiently clear to constitute a statute prohibiting discrimination by federal funding recipients. If it is not, then this Court should resolve this important question for Congress, the lower courts and the states to follow.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: January 8, 2010

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-1409

James Dean Van Wyhe,

Appellee,

v.

Tim Reisch; Douglas Weber; Jennifer Wagner,

Appellants.

No. 08-1413

Charles E. Sisney,

Appellee,

v.

Tim Reisch, in both his

Appeals from the United States District Court for the District of South Dakota

[PUBLISHED]

Individual and official capacities as Secretary of Corrections for South Dakota; Douglas L. Weber, in both his individual and official capacities as Chief Warden for the Department of Corrections of South Dakota; Dennis Block, in both his individual and official capacities as Associate Warden for the South Dakota State Penitentiary; Jennifer Wagner, in both her Individual and official Capacities as Cultural Activities Coordinator for the South Dakota State Penitentiary, also known as Jennifer Lane; Daryl Slykhuis, Interim Warden of the South Dakota State Penitentiary, in his Individual and official Capacity,

Appellants.

United States of America,

Intervenor below – Appellee.

Submitted: November 13, 2008
Filed: September 10, 2009

Before MURPHY, HANSEN, and RILEY, Circuit Judges.

HANSEN, Circuit Judge.

James Dean Van Wyhe and Charles E. Sisney, prisoners at the South Dakota State Penitentiary ("SDSP"), each brought a suit against South Dakota prison officials, asserting various claims of interference with their free exercise of religion under the First Amendment and Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 804, 42 U.S.C. § 2000cc-1(a)(1)-(2). Sisney added two claims of retaliation. The prison officials bring this interlocutory appeal of the district court's summary judgment rulings. See Van Wyhe v. Reisch, 536 F. Supp. 2d 1110 (D.S. D. 2008); Sisney v. Reisch, 533 F. Supp. 2d 952 (D.S.D. 2008). They challenge the constitutionality of RLUIPA, the district court's conclusion that the state waived its Eleventh Amendment sovereign immunity from suit for monetary damages, the denial of summary judgment on the RLUIPA and First Amendment claims, and the denial of qualified immunity and summary judgment on the retaliation claims. The United States intervenes in this appeal for the purpose of arguing that RLUIPA is constitutional. We affirm in part, reverse in part, and dismiss some claims for lack of interlocutory jurisdiction.

I.

A. Sisney's Claims

Sisney, a SDSP inmate who practices the Jewish faith, brought suit pursuant to 42 U.S.C. § 1983 and RLUIPA for the violation of his free exercise of religion rights, naming as defendants Tim Reisch, Secretary of the South Dakota Department of Corrections ("DOC"); Douglas Weber, Chief Warden for the DOC; Dennis Block, Associate Warden for the SDSP; Jennifer Wagner, Cultural Activities Coordinator for the SDSP; Doug Loen, Policy Analyst for the SDSP; Daryl Slykhuis, Interim Warden of the SDSP; and others (collectively, "the prison officials"). Sisney claimed that the prison officials violated his right to the free exercise of religion under RLUIPA and the First Amendment by denying (among other things not relevant to this appeal) his request to possess and use a succah, his request to have a tape player in his cell to study the Hebrew language, and his request for additional group religious and language study time.

Sisney asserted that his religion requires him to celebrate the week-long Jewish festival of Sukkot by eating meals outside in a succah and reciting a special benediction before sundown. A succah is a three-sided booth or tent constructed of a tarp and metal poles. The succah is not a permanent structure, and it is large enough to accommodate only one person at a time. Sisney's

project application suggested that if he is not allowed to eat meals in the succah, he could alternatively eat meals as normal, as long as he is provided extra time for the recitation of the special benediction, but he asserted that he included this suggested accommodation only because he had been told that his request for a succah would be denied. The group of Jewish prisoners at SDSP did not possess a succah, but Jewish inmates at South Dakota's low- to medium-security prison tried to donate one to the SDSP Jewish inmates. The prison officials denied Sisney's request for a succah on the grounds that prison policy prohibits inmate-to-inmate transfer of property and that the succah presents a safety and security concern. Instead, they permitted Sisney the extra time each evening during the festival to recite the benediction.

The prison officials denied Sisney's request for additional group meeting time to study the Torah, Kabbalah, and the Hebrew language. The Jewish group is permitted three hours of group meeting and service time per week in addition to group worship on special religious holidays. Prior to 2000, the group met for 90 minutes per week, but in response to Sisney's request for additional group time for Torah study and prayer, the time was increased to three hours. The prison officials stated that Sisney's new application did not explain why the group now needed yet more time for the same activities. Sisney is allowed to study

on his own in his free time.

Additionally, the prison officials denied Sisney's request to have a tape player in his cell to aid in his study of the Hebrew language. Sisney does not currently have access to any Hebrew language tapes but claims that he needs the tape player because the group meeting times provided are insufficient to facilitate his language studies. The prison does not allow any inmate to have a tape player in a cell because it is a safety and security concern. Sisney has access to a tape player during the weekly group meeting times, and he may practice Hebrew in his cell without the tape player.

Sisney also claimed that, in retaliation for filing this suit, Interim Warden Slykhuis denied immediate delivery to Sisney of The Jailhouse Lawyer's Handbook, a publication that arrived as unsolicited mail from the Center for Constitutional Rights. Sisney claimed that Warden Slykhuis knew of this lawsuit and refused to immediately deliver the handbook without asking Sisney if he had ordered it. Sisney asserted that the same handbook was immediately delivered to other inmates, that prison policy did not require the immediate rejection of the entire correspondence, and that he later received the handbook. Warden Slykhuis asserted that he acted reasonably pursuant to a prison operational memorandum.

Sisney claimed that Cultural Activities Coordinator Wagner retaliated against him by engaging in a pattern of religious discrimination and harassment and by interfering with his relationship with the Aleph Institute, an organization that was providing him materials helpful to the practice of his religion. According to Sisney, Wagner had inquired as to why the Aleph Institute was assisting Sisney, who was not born of a Jewish mother, and that this inquiry caused the Aleph Institute to stop sending him materials. Wagner said she repeatedly contacted the Aleph Institute asking for free educational materials, food, and other items for Sisney and the other members of the Jewish group, but Aleph has refused to aid Sisney because it does not deem him to be Jewish under Jewish law.

In a lengthy opinion, the district court concluded that RLUIPA is constitutional under the Spending Clause and permits only official-capacity suits. The district court concluded that the state had waived its Eleventh Amendment sovereign immunity from suit for monetary damages by accepting federal funds under the terms of RLUIPA and the Civil Rights Remedies Equalization Act of 1986 (CRREA), 42 U.S.C. § 2000d-7, and therefore, the court denied sovereign immunity from monetary damages on the official-capacity RLUIPA claims. But, the district court noted that any monetary relief necessarily would be limited to nominal damages as required by the

Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(e). Injunctive relief was also held to be available on the RLUIPA and the First Amendment official-capacity claims. On the merits of those claims, the district court granted summary judgment on some claims and denied summary judgment on others. Specifically, the court held that Sisney had demonstrated a substantial burden on his free exercise rights regarding the denial of a succah, the denial of additional group religious study time, and the denial of a tape player, but the court concluded that material questions of fact remained on whether Sisney's beliefs were sincere and whether the denial of these requests was the least restrictive means of furthering the state's compelling interests.

As to the § 1983 First Amendment claims against prison officials in their individual capacities, the district court granted qualified immunity. On the retaliation claims, the district court denied summary judgment, finding material questions of fact existing on the issue of the intent to retaliate.

B. Van Wyhe's Claims

Van Wyhe is also an inmate at the SDSP. In relevant part, he brought suit against several South Dakota prison officials claiming that they violated his free exercise of religion rights under

RLUIPA and the First Amendment by implementing a prison policy, SDDOC Policy 1.5.F.2, which was in effect when his suit was filed. Pursuant to this policy, prison officials deprived Van Wyhe of kosher meals for a period of time as a sanction for violating the prison rules governing religious diets. Effective February 14, 2007, this policy was changed, eliminating the sanction of removal from the religious diet program for a prison rules violation. Van Wyhe is currently receiving a kosher diet. He sought monetary, injunctive, and declaratory relief based upon the policy as it existed prior to February 14, 2007, but he did not challenge the amended policy.

In ruling on the prison officials' motion for summary judgment, the district court relied on the legal conclusions made in Sisney's case regarding sovereign immunity, the availability of monetary damages under RLUIPA as limited by the PLRA, and the constitutionality of RLUIPA. Because the policy changed as of February 14, 2007, the district court concluded that Van Wyhe was not entitled to injunctive or declaratory relief regarding the original version of the policy but permitted the official-capacity RLUIPA claim for monetary damages to proceed against the officials involved in enforcing the original Policy-secretary Reisch, Warden Weber, and Cultural Activities Coordinator Wagner. The district court granted qualified immunity on the § 1983 First Amendment individual capacity claims.

In these consolidated interlocutory appeals, the prison officials appeal the district court's denials of summary judgment. We are also called upon to consider the constitutionality of RLUIPA, as well as the availability of monetary damages against the state government under RLUIPA.

II.

A. Jurisdiction

Ordinarily, we lack jurisdiction over an interlocutory appeal challenging the denial of summary judgment, but an immediate appeal is appropriate where summary judgment is denied on the grounds of sovereign immunity or qualified immunity, because immunity "'is effectively lost if a case is erroneously permitted to go to trial.'" Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)); see also Monroe v. Ark. State Univ., 495 F.3d 591, 593-94 (8th Cir. 2007). However, immediate appeal is appropriate only "'to the extent that it turns on an issue of law.'" Powell v. Johnson, 405 F.3d 652, 654 (8th Cir. 2005) (quoting Mitchell, 472 U.S. at 530). Our limited ability to reach the merits of the underlying dispute extends only to legal issues that are "inextricably intertwined" with the district court's denial of immunity, Swint v. Chambers County Comm'n, 514 U.S. 35, 51 (1995), and not to claims where the denial of

summary judgment was based on disputes over the sufficiency of the evidence, that is, "which facts a party may, or may not, be able to prove at trial," Johnson v. Jones, 515 U.S. 304, 313 (1995). The district court's determination that the summary judgment record raises a genuine issue of fact as to a government official's involvement in the alleged constitutional violation is not a final decision subject to immediate appeal. Id.

We conclude that we have jurisdiction to consider the legal issues of whether Section 3 of RLUIPA is constitutional under Congress's Spending Clause authority and whether the state waived its Eleventh Amendment immunity from monetary damages by accepting federal funds under RLUIPA, because the issues are intertwined with the district court's denial of sovereign immunity. We have jurisdiction to consider the merits of the RLUIPA and First Amendment claims regarding the succah, the tape player, the additional group time, and the retaliation claims only to the extent that they turn on issues of law, which we will address separately below.

We apply *de novo* review to the district court's denial of summary judgment on the grounds of sovereign and qualified immunity, considering the evidence and all reasonable

inferences from the evidence in the light most favorable to the nonmoving parties. McLean v. Gordon, 548 F.3d 613, 616 (8th Cir. 2008). We take as true those facts asserted by Sisney and Van Wyhe "that are properly supported by the record." Monroe, 495 F.3d at 594. "Summary judgment is appropriate where 'there is no genuine issue as to any material fact and . . . the movant[s are] entitled to judgment as a matter of law.'" McLean, 548 F.3d at 616 (quoting Fed. R. Civ. P. 56(c) (ellipsis in original)).

B. RLUIPA

We begin with the language of the statute, which provides prison inmates the following protection:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a) (1)-(2) ("Section 3"). Section 3 of RLUIPA protects inmate religious exercise[1] in this manner "when the substantial burden is imposed in a program or activity[2] that receives Federal financial assistance." Id. § 2000cc-1(b)(1).[3] RLUIPA defines the term "religious exercise" as "including the exercise of religion, whether or not compelled by, or central to, a system of religious belief." Id. § 2000cc-5(7)(A).

RLUIPA explicitly provides for a cause of action to enforce the heightened free exercise right it creates. Id. § 2000cc-2(a)-(g) ("Section 4") (stating a person may assert a RLUIPA violation as "a claim or defense in a judicial proceeding and obtain appropriate relief against a government"). In such a suit, if the institutionalized person "produces prima facie evidence to support a claim," by showing that the government practice substantially burdens the person's exercise of religion, then the government bears the burden of

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1 RLUIPA also contains a separate protection of land use as religious exercise in Section 2, but that provision is not implicated by this appeal.

2 The parties do not dispute that RLUIPA applies to South Dakota's prisons.

3 The statute also purports to apply to a substantial burden that affects commerce, id. § 2000cc-1(b)(2), but because the undisputed facts of this case do not affect commerce, this appeal reaches only RLUIPA's federal funding underpinnings.

persuasion on every other element of the claim. Id. § 2000cc-2(b).

1. Constitutionality of RLUIPA

The prison officials challenge the district court's conclusion that Section 3 of RLUIPA is a constitutional exercise of Congress's Spending Clause authority. For the reasons that follow, consistent with the reasons set forth by every other circuit court of appeals to address the question, we conclude that Section 3 of RLUIPA is a constitutional exercise of legislative authority under the Spending Clause. See Madison v. Virginia, 474 F.3d 118, 124 (4th Cir. 2006); Cutter v. Wilkinson, 423 F.3d 579, 584-90 (6th Cir. 2005); Benning v. Georgia, 391 F.3d 1299, 1305-08 (11th Cir. 2004); Charles v. Verhagen, 348 F.3d 601, 606-11 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062, 1066-70 (9th Cir. 2002), cert. denied, 540 U.S. 815 (2003); see also Sossamon v. Texas, 560 F.3d 316, 328-29 (5th Cir. 2009) (concluding that RLUIPA "was passed pursuant to the Spending Clause"); Smith v. Allen, 502 F.3d 1255, 1270, 1274 n.9 (11th Cir. 2007) (agreeing that RLUIPA "hinges on Congress' Spending Power"). We adopt the reasoning set forth in those cases with little to add, addressing only the specific arguments raised by the prison officials.

Under the Spending Clause, Congress has the power, among other things, to provide for the "general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This provides Congress with incidental authority to "attach conditions on the receipt of federal funds, and [Congress] has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal money[] upon compliance by the recipient with federal statutory and administrative directives." South Dakota v. Dole, 483 U.S. 203, 206 (1987) (internal marks omitted). Thus, consistent with the Spending Clause, Congress may use conditional grants of federal funds to achieve objectives that are not within the scope of Article I, id., such as requiring a state to waive its "sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly," Jim C. v. United States, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001).

Determining whether legislation is a permissible use of Congress's spending power requires a consideration of several limiting factors as set forth by the Supreme Court in Dole: (1) the legislation must be in pursuit of the general welfare, (2) conditions on the state's receipt of federal funds must be set out unambiguously so that the state's

participation is the result of a knowing and informed choice, (3) conditions on federal funds must be related to the federal interest in particular national projects or programs, (4) conditions must not be prohibited by other constitutional provisions, and finally, (5) the circumstances must not be so coercive that "pressure turns into compulsion." 483 U.S. at 207-11 (internal marks omitted).

Under the terms of RLUIPA, a state prison that receives federal funding does so on two conditions: (1) that the prison officials not impose a substantial burden on an inmate's religious exercise unless that burden is justified by a compelling government interest and is the least restrictive means of furthering that compelling interest, 42 U.S.C. § 2000cc-1(a); and (2) that the state must submit to judicial proceedings for "appropriate relief" to enforce RLUIPA, id. § 2000cc-2(a).

The first Dole factor, which requires that the legislation must be in pursuit of the general welfare, is satisfied by RLUIPA's protection of an inmate's religious exercise. The state prison officials argue that RLUIPA interferes with prison administration and improperly encroaches on a purely local concern–the operation of state correctional facilities. We respectfully disagree. As a general matter, "the concept of welfare or the

opposite is shaped by Congress" in the first instance. Dole, 483 U.S. at 208 (internal marks omitted). Congress has determined that encouraging greater protection of religious worship within prisons promotes the general welfare, and we find it to be beyond serious dispute that this protection furthers society's larger goal of rehabilitating inmates as well as simply respecting individual religious worship. Purely local matters of prison administration are not jeopardized because RLUIPA permits even substantial burdens on religious exercise to be imposed when the state uses the least restrictive means of pursuing its compelling government interests. RLUIPA allows courts to give "due deference" to the expertise of prison officials in achieving the compelling government interests involved in prison operations, and "Congress did not intend to overly burden prison operations" but to provide heightened religious protection "without undermining the security, discipline, and order of those institutions." Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 987-88 (8th Cir.), cert. denied, 543 U.S. 991 (2004). RLUIPA respects the compelling local concerns while enhancing the general welfare.

Second, the statutory language of RLUIPA is sufficiently clear to satisfy Dole's second factor–that the conditions on the

receipt of federal funds be set forth unambiguously. Section 3 and Section 4 of RLUIPA together plainly condition the state's receipt of federal funds on the requirement that the state provide RLUIPA's heightened religious protection to inmates and that the state submit to a cause of action to enforce that right. The prison officials argue that RLUIPA does not clearly indicate that by accepting federal funding for prisons, the state is required to provide an inmate with kosher meals or a succah, but this level of specificity is not required. RLUIPA provides a pliable standard, permitting prison officials the freedom to make judgment calls by granting the states "wide latitude in applying its provisions, but this flexibility does not make the conditions of RLUIPA opaque." Benning, 391 F.3d at 1306. The circuit courts of appeals agree that setting forth every conceivable variation in the statute is neither feasible nor required and that RLUIPA appropriately provides the state "the freedom to tailor compliance according to its particular penological interests and circumstances." Charles, 348 F.3d at 608 (relying on Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24-25 (1981)). See also Benning, 391 F.3d at 1306; Mayweathers, 314 F.3d at 1067. As always, the devil is in the details, but Congress has deemed the prison officials to be best suited to deal with those details on a case-by- case basis in their ordinary prison

operations. We conclude that RLUIPA sets forth the general right to heightened protection of religious exercise with sufficient clarity, and unambiguously conditions the state's acceptance of federal funding on its agreement to enforce that protection.

The third Dole factor is satisfied because the condition on which the state receives the federal funding, that is, protecting inmates' religious exercise against substantial burdens that are not justified by compelling state interests, is reasonably related to the funding of prison programs. See Cutter, 423 F.3d at 586 (stating Dole "suggests that a condition on federal funding is constitutional so long as it is reasonably calculated to address the federal interest" (internal marks omitted)). "Both the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress, and those goals are related to the use of federal funds for state prisons." Benning, 391 F.3d at 1308. The prison officials' assertion otherwise is simply without merit.

The fourth Dole factor requires a consideration of whether other constitutional provisions prohibit these particular conditions on federal funding. The prison officials argue that RLUIPA violates the doctrine of the separation of powers because the statute

improperly overturns the more deferential constitutional standard set forth by the Supreme Court for evaluating prisoners' free exercise of religion claims, see Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that prison regulations must be reasonably related to legitimate penological interests to withstand a constitutional challenge), and improperly substitutes a standard of strict scrutiny. We disagree. RLUIPA does not attempt to change the standard of review for First Amendment claims, but it "'establishe[s] a statutory free exercise claim encompassing a higher standard of review than that which applies to constitutional free exercise claims.'" See Gladson v. Iowa Dep't of Corr., 551 F.3d 825, 832 (8th Cir. 2009) (quoting Murphy, 372 F.3d at 987). Context remains important. The application of this statutory compelling interest standard "does not 'elevate accommodation of religious observances over an institutions need to maintain order and safety.'" Fegans v. Norris, 537 F.3d 897, 902 (8th Cir. 2008) (quoting Cutter v. Wilkinson, 544 U.S. 709, 722 (2005)). Instead, RLUIPA appropriately views the constitutional standard as a floor, not a ceiling, and provides additional statutory protection for religious worship in a particular context. See Mayweathers, 314 F.3d at 1070 (stating the Court in Employment Div. v. Smith,494 U.S. 872, 890 (1990), "explicitly left [the question of whether to provide]

heightened legislative protection for religious worship to the political branches"). Congress's policy decision to provide this heightened protection is well within Congress's appropriate legislative role. "Nothing in the Spending Clause . . .forecloses Congress from placing conditions on federal funds that reach beyond what the Constitution requires." Madison, 474 F.3d at 127.

Finally, the state prison officials assert that the amount of federal funding provided to the state prison renders the statutory conditions unconstitutionally coercive. We agree with the district court's conclusion that, although the federal funding amount involved here is not insubstantial, it does not render the statute unconstitutionally coercive in light of our prior case law. In Jim C., we rejected a Spending Clause challenge in which the state argued that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 974, was unconstitutionally coercive. 235 F.3d at 1082. We concluded that the state's potential loss of $250 million dollars in federal funding, which amounted to 100% of the state's federal education funding and approximately 12% of the state's annual education budget, "would be politically painful" but was not impermissibly coercive. Id. We found no reason to deviate from that authority in Doe v. Nebraska, involving a challenge to the state's waiver of

immunity under Section 504 of the Rehabilitation Act. 345 F.3d 593, 599 (8th Cir. 2003). Relying on Jim C., we held that there was no coercion, even though the state would potentially lose approximately $557 million per year and the federal funding totaled 60% of the state agency's operating budget. Id.

Here, South Dakota received over $64 million from federal funding over the period from 2001 through 2006, amounting to between 9.5% and 17.35% of the DOC's annual budget during those years. Our prior cases lead us to conclude that this is not so great an amount as to render the statute unduly coercive. While a potential loss of 100% of the federal funding for state prisons would indeed be painful, the statute is intended as an inducement, and the final choice is left to each state. "[H]ard choices do not alone amount to coercion." Madison, 474 F.3d at 128. "'If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.'" Jim C., 235 F.3d at 1082 (quoting New York v. United States, 505 U.S. 144, 168 (1992)). We conclude that "the Spending Clause allows Congress to present States with this sort of choice," id., and that RLUIPA is not unduly coercive.

We therefore affirm the district court's conclusion that RLUIPA is constitutional

under the Spending Clause. Because of this conclusion and the fact that this case presents no facts implicating any connection to commerce, we decline to address the state prison officials' arguments regarding the constitutionality of RLUIPA under the Commerce Clause.

2. Eleventh Amendment Immunity under RLUIPA

The prison officials challenge the district court's conclusion that RLUIPA, coupled with the explicit language of CRREA, permits monetary damage claims against the state subject to the limitations imposed by the PLRA. Our conclusion above that RLUIPA is sufficiently clear to be a valid exercise of Spending Clause power does not foreclose our consideration of whether RLUIPA is sufficiently clear to effectuate a knowing waiver of the state's Eleventh Amendment sovereign immunity from a suit for monetary damages.[4] See Sossamon, 560 F.3d at 330-331

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[4] The Supreme Court has recognized two circumstances in which an individual may bring suit in federal court against a state. First, Congress may abrogate a state's sovereign immunity through legislation enacted pursuant to its Section 5 enforcement power of the Fourteenth Amendment, which was "enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance." Coll. Sav. Bank v. Fl. Prepaid Postsecondary

(considering the issue of sovereign immunity separately from the Dole factors); Madison, 474 F.3d at 129 (same).

There can be no constructive waiver of sovereign immunity, and we "indulge every reasonable presumption against waiver." Coll. Sav. Bank, 527 U.S. at 682 (internal marks omitted). The Supreme Court, construing the federal government's waiver of sovereign immunity, has stated that "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." Lane v. Pena, 518 U.S. 187, 192 (1996) *citing* United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992)). Additionally, waivers are to be "construed strictly in favor of the sovereign and not enlarged beyond what the language requires." See Nordic Village, Inc., 503 U.S. at 34

Educ. Expense Bd., 527 U.S. 666, 670 (1999). "Second, a State may waive its sovereign immunity by consenting to suit." Id. (emphasis supplied.) RLUIPA, as an exercise of Congress's Spending Clause power, "is therefore not an attempt by Congress to *abrogate* [the state's] sovereign immunity, but to goad [the state] to *waive* its sovereign immunity by accepting federal funds conditioned on accepting liability." Sossamon, 560 F.3d at 329. The two distinct methods should not be confused. One requires only action by the Congress; the other requires knowing action by the state.

(internal marks and citations omitted).

RLUIPA conditions the state's acceptance of federal funds, in part, on its consent to suit for "appropriate relief." 42 U.S.C. § 2000cc-2(a). As we concluded above, this phrase plainly creates a private cause of action against the state "for at least some form of relief." Madison, 474 F.3d at 130. The phrase, "appropriate relief," is broad enough to include both injunctive relief and compensatory damages, but the question is whether the language *unambiguously* extends to monetary claims. There is a split of circuit authority on this issue. In Madison v. Virginia, the Fourth Circuit held that in the sovereign immunity waiver context, the "appropriate relief" language "falls short of the unequivocal textual expression necessary to waive the State immunity from suits for damages." Id. See also Sossamon, 560 F.3d at 331 (holding "RLUIPA is clear enough to create a right for damages on the cause- of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief"); Cardinal v. Metrish, 564 F.3d 794, 801 (6th Cir. 2009) ("RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a state's consent to suit for money damages."); Nelson v. Miller, 570 F.3d 868, 884 (7th Cir.

2009) (statutory reference to "'appropriate relief'. . . does not provide the 'unequivocal textual expression' necessary to effect" waiver of state sovereign immunity for money damages). Accord Webman v. Fed. Bureau of Prisons, 441 F.3d 1022, 1025-26 (D.C. Cir. 2006) (construing the identical language in RFRA as not conveying an unambiguous waiver of sovereign immunity from money damages).

In contrast, the Eleventh Circuit concluded in Smith v. Allen "that, absent an intent to the contrary, the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief." 502 F.3d at 1271. In reaching this conclusion, the court relied on Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992), which articulates a presumption in favor of making *all* appropriate remedies available when Congress uses broad language in crafting remedies. See Smith, 502 F.3d at 1270. In Franklin, however, the Supreme Court was dealing with an implied cause of action for intentional discrimination and had no occasion to discuss whether any statutory language was specific enough to effectuate a knowing waiver of state sovereign immunity by its acceptance of the federal benefit. Franklin did not involve a question of state sovereign immunity. Cardinal, 564 F.3d at 800-801. In a case decided after Franklin,

the Supreme Court itself rejected any idea that sovereign immunity could be waived by anything other than the "unequivocal expression of elimination of sovereign immunity . . . in statutory text." Lane, 518 U.S. at 192 (internal marks omitted). For these reasons, we decline to follow the analysis set forth by the Eleventh Circuit in Smith. We agree, instead, with the analysis of the Fourth, Fifth, Sixth, and Seventh Circuits that RLUIPA's "appropriate relief" language does not unambiguously encompass monetary damages so as to effect a waiver of sovereign immunity from suit for monetary claims under Section 3 by acceptance of the federal money. See, e.g., Madison, 474 F.3d at 131 (quoting Lane, 518 U.S. at 196, for the proposition that "Congress is, of course free to condition funds upon a waiver of 'sovereign immunity against liability without waiving [a State's] immunity from monetary damages awards'" (alteration in original)).

The district court reached this same conclusion but then reasoned that, although RLUIPA does not waive sovereign immunity from monetary damages, the waiver is nevertheless accomplished by the unambiguous language of CRREA. The prison officials argue that this conclusion is in error. CRREA explicitly provides that a state does not retain its Eleventh Amendment immunity

with regard to the violation of certain named civil rights statutes (namely, the Rehabilitation Act, Title IX, the Age Discrimination Act, and Title VI of the Civil Rights Act), or "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). The district court concluded that, although RLUIPA is not listed specifically in CRREA, RLUIPA is within its catch-all phrase as a federal statute "prohibiting discrimination," id., and thus, CRREA's explicit waiver of sovereign immunity applies equally to RLUIPA. We respectfully disagree with that analysis.

The institutionalized persons section of RLUIPA at issue in this suit (Section 3), does not unambiguously prohibit discrimination–it prohibits substantial burdens on religious exercise, without regard to discriminatory intent.[5] Congress understands how to create a

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[5] The district court cited the Seventh Circuit's statement that "RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.'" Charles, 348 F.3d at 607 (quoting Mayweathers, 314 F.3d at 1067). Context demonstrates, however, that this statement was not made within a textual analysis of the scope of appropriate relief under RLUIPA but in the distinct and different discussion of whether RLUIPA is valid Spending Clause legislation in pursuit of the general

federal statute prohibiting discrimination, and it did so within RLUIPA's separate section (Section 2) dealing with land use regulations. Section 2 of RLUIPA prohibits "discrimination" against religious institutions "on the basis of religion" with regard to land use regulations and prohibits land use regulations that treat a religious institution "on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1), (2). Similar language, prohibiting discrimination or requiring equal treatment, is conspicuously omitted from the RLUIPA protections afforded to institutionalized persons under Section 3. It is appropriate to consider these sections independently of one another. See Cutter, 544 U.S. at 715 n.3 (declining to address the land use section of RLUIPA, and independently considering the constitutional validity of the institutionalized persons section under the Establishment Clause).

The antidiscrimination statutes listed in CRREA all explicitly prohibit discrimination, and the institutionalized persons section of RLUIPA does not fit neatly within that genre. See Madison, 474 F.3d at 133. Absent an unequivocal textual indication that CRREA

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welfare. As such, this statement is not authoritative in determining the scope of the state's waiver of immunity.

applies to Section 3 institutionalized-person-RLUIPA claims, we will not rely on CRREA to effectuate a knowing waiver of sovereign immunity from money damages on those claims.

Because the state did not waive its immunity from suit for monetary damages by accepting federal funds on the conditions set forth in the institutionalized persons section of RLUIPA (Section 3), we reverse the district court's denial of summary judgment to the prison officials in Van Wyhe's suit, and remand for entry of judgment in favor of Tim Reisch, Douglas Weber, and Jennifer Wagner on the RLUIPA official- capacity claims. Similarly, this conclusion requires the entry of summary judgment in favor of the prison officials on Sisney's official-capacity RLUIPA claims for money damages against Tim Reisch, Douglas Weber, Dennis Block, and Jennifer Wagner.

3. Surviving RLUIPA Claims

We next consider the surviving official-capacity RLUIPA claims.[6] No claims survive

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6 The district court concluded that RLUIPA does not permit suit against state officials in their individual capacity because the Spending Clause authority by which RLUIPA was enacted will not support an action against an official in his or her

in Van Wyhe's suit. In Sisney's suit, three claims for injunctive relief survive the denial of the succah, the denial of additional group religious study time, and the denial of a tape player in his cell. On each of these, the district court found questions of material fact existing on the issue of whether the prison officials had used the least restrictive means of achieving the compelling governmental interests. As already noted, our jurisdiction in this interlocutory appeal extends only to the extent the denial of summary judgment turns on an issue of law and not disputes of fact. To make out a prima facie RLUIPA claim against a state official, an inmate "must 'show, as a threshold matter, that there is a substantial burden on his ability to exercise his religion.'" Singson v. Norris, 553 F.3d 660, 662 (8th Cir. 2009) (quoting Murphy, 372 F.3d at 988). Absent this showing, the state retains its sovereign immunity. The district court did not identify any material questions of fact in dispute on this threshold issue. We therefore have interlocutory jurisdiction to consider this threshold legal issue on each claim, construing the facts in the light most favorable to Sisney. See Prescott v. Little Six, Inc., 387 F.3d 753, 755-56 (8th Cir. 2004) (noting we have "jurisdiction to decide closely related issues of

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individual capacity. See Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610-11 (8th Cir. 1999). That conclusion is not at issue in this appeal.

law, i.e., claims that are inextricably intertwined with or necessary to ensure meaningful review of the sovereign immunity issue" (internal marks omitted)), cert. denied, 544 U.S. 1032 (2005).

RLUIPA "defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" Cutter, 544 U.S. at 715 (quoting § 2000cc-5(7)(A)). We have held, largely consistent with our First Amendment cases, that to demonstrate a substantial burden on the exercise of religion, a government policy or action "'must significantly inhibit or constrain [religious] conduct or [religious] expression . . .; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.'" Patel v. U. S. Bureau of Prisons, 515 F.3d 807, 813 & n.7 (8th Cir. 2008) (quoting Murphy, 372 F.3d at 988). We alter this definition somewhat in the RLUIPA context, mindful that RLUIPA's broad protection of "religious exercise" extends even to religious practices that are not "compelled by, or central to" a certain belief system. Id. at 813 n.7; see Gladson, 551 F.3d at 832-33 (acknowledging that we apply the definition of substantial burden set forth

in Murphy and as subsequently clarified by the Supreme Court in Cutter, 544 U.S. at 725 n.13, to "bar[] inquiry into whether a particular belief or practice is 'central' to a prisoner's religion").

a. The Succah: The officials argue that Sisney failed to make a sufficient threshold showing of a substantial burden because he submitted only his own conclusory statement as evidence. In response to the summary judgment motion, Sisney explained the religious significance of the succah (or tent), and he described it as being "a mandatory part of the Sukkot Festival" and essential to the practice of his Jewish faith.[7] (Appellants' App. at 807.) This assertion is not devoid of the necessary factual allegations–the succah is an expression of Sisney's faith during this religious festival and this expression of his faith is significantly inhibited, constrained, or altered by the denial of his request to use the succah during the Festival of Sukkot. Sisney provided some explanation of his faith and the religious exercise at issue. He did not rest on a conclusory allegation that his religious

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[7] Sukkot is "a Jewish religious festival of thanksgiving celebrated originally as an autumn harvest festival that is commemorative of the temporary shelters of the Jews during their wandering in the wilderness." Webster's Third New International Dictionary 2287 (1986). It is also called the Feast of Booths and the Feast of Tabernacles. Id.

exercise was "substantially burdened," but there is evidence from which such a conclusion could be drawn. Whether Sisney can establish the truth or sincerity of this belief is a matter to be decided at trial, but we cannot say that his evidence is insufficient as a matter of law to withstand summary judgment. See Murphy, 372 F.3d at 988 (relying on the inmate's assertions to reverse a grant of summary judgment). The district court did not err as a matter of law by concluding that Sisney met his threshold burden with regard to the succah request. We lack jurisdiction to consider further issues on which the district court found material questions of fact.

b. Group Study Time: The prison officials argue that Sisney did not meet the threshold showing of a substantial burden on his religious exercise with regard to his request for additional weekly meeting time for Torah, Kabbala, and Hebrew language studies. The three-hour group worship and study time currently allotted resulted from Sisney's prior application for an additional 90 minutes each week to study the Torah. Now, Sisney asserts that the three hours currently provided is inadequate for group religious study because the time is consumed with Jewish worship services and Torah studies, leaving not enough time to study the Hebrew language. Sisney states that while Torah study is foremost and

cannot be exchanged for the Hebrew study, his religion considers learning Hebrew to be a "mikvah," or "good deed." (Appellants' App. at 117.)

The prison must permit a reasonable opportunity for an inmate to engage in religious activities but need not provide unlimited opportunities. In Gladson, Wiccan inmates argued that a three-hour limitation on their celebration of a religious holiday substantially burdened their religious exercise under RLUIPA. 551 F.3d at 834. We held that the inmates "failed to offer any evidence" that three hours for their religious holiday celebration "significantly inhibits or constrains their conduct or expression; meaningfully curtails their ability to express adherence to their faith; or denies them reasonable opportunities to engage in those activities that are fundamental to their religion." Id. Additionally, we have held in the First Amendment context that, where an inmate was permitted three hours of group worship time, the denial of one extra hour per week did not substantially burden the inmate's religious exercise: "three hours of group worship per week provided [the inmate] with a reasonable opportunity to exercise his religious freedom." Wier v. Nix, 114 F.3d 817, 821 (8th Cir. 1997). We do not demand doctrinal justification to support the desired

religious exercise, but the inmate does bear the burden of establishing a *substantial* burden on a religious exercise. Gladson, 551 F.3d 833.

The record does not support a conclusion that Sisney's religious exercise of group study has been substantially burdened. He is permitted three hours of group study and worship time with other Jewish inmates and is additionally permitted to study the language and the religion individually in his cell. His explanation that the time is "inadequate" does not indicate how the denial of extra group study time significantly inhibits or curtails his religious expression or deprives him of a meaningful opportunity to engage in his religious activities. We do not question his assertion that learning to speak Hebrew is a "good deed" that will make his religious exercise more meaningful, but he has not asserted facts from which a juror could conclude that the denial of additional *group* time to study the language places a substantial burden on his religious exercise. The prison officials (Weber, Block, and Wagner) are therefore entitled to summary judgment on this claim.

c. The Tape Player: The prison officials denied Sisney's request to have and use a tape player in his cell for religious language

studies. Although Sisney's religion deems it a "good deed" to speak Hebrew, he does not assert that the tape player itself is a religious item or that having one in his cell is the only way he can learn the language necessary to his religious conduct. The record indicates that Sisney has reasonable access to a tape player during the group meeting times (though he has no tapes) and that he is permitted to study the language in his cell with books. RLUIPA does not require the prison to permit an inmate to possess every tangential item of property that could aid the inmate's religious exercise or learning. Depriving Sisney of a tape player in his cell does not significantly inhibit his religious expression, meaningfully curtail his ability to adhere to his faith, or deprive him of a reasonable opportunity to engage in that religious activity. Sisney has not set forth sufficient evidence to demonstrate that his religious exercise is substantially burdened by the denial of a tape player in his cell, and accordingly, the prison officials (Weber, Block and Wagner) are entitled to summary judgment on this claim.

C. First Amendment Free Exercise

Where an inmate has not put forth sufficient evidence under RLUIPA to demonstrate a substantial burden on his

religious exercise, his claim fails under the Free Exercise Clause of the First Amendment as well. See Patel, 515 F.3d at 813. Thus, for the reasons stated above, the prison officials are also entitled to summary judgment on Sisney's official-capacity First Amendment claims for extra group study time and for a tape player in his cell.

As to the request for a succah, the district court appropriately considered this claim under the First Amendment standard set forth in Turner, 482 U.S. at 89-90, and found material questions of fact in dispute. For this reason, we lack jurisdiction in this interlocutory appeal to consider this issue further.

D. Retaliation

Interim Warden Slykhuis and Cultural Activities Coordinator Wagner appeal the district court's denial of summary judgment and qualified immunity on Sisney's official-capacity and individual-capacity retaliation claims against them. We have held that conduct that retaliates against the exercise of a constitutionally protected right, such as access to the courts, is actionable even if the alleged retaliatory conduct does not itself rise to the level of a constitutional violation. Cody v. Weber, 256 F.3d 764, 771 (8th Cir. 2001).

"The violation lies in the *intent* to impede access to the courts. Id. (internal marks omitted).

The district court concluded that genuine issues of material fact exist on Sisney's retaliation claims. Slykhuis and Wagner do not argue that Sisney's right against retaliation is not clearly established but that their conduct was reasonable and justified, or did not occur as Sisney alleges. On this, the district court found the existence of material questions of fact. These arguments present the type of factual disputes that "exceed[] our limited scope of review" because they generally concern "'which facts a party may, or may not, be able to prove at trial.'" See Powell, 405 F.3d at 655 (quoting Johnson, 515 U.S. at 313). Accordingly, we lack jurisdiction to consider them.

III.

We reverse the district court's denial of summary judgment on the official-capacity RLUIPA claims for monetary damages of both Van Wyhe and Sisney based on our conclusions that RLUIPA is constitutional and that the prison officials are entitled to the protection of sovereign immunity from monetary damages. We also reverse the district court's denial of summary judgment on Sisney's injunctive relief claims for a tape player and extra group study time under RLUIPA and the First Amendment Free Exercise Clause. We remand for entry of judgment in favor

of the prison officials on those claims and for further proceedings; we lack jurisdiction to consider in this appeal Sisney's claim for a succah and his retaliation claims due to the existence of genuine disputes of material fact.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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CHARLES E. SISNEY,	*	CIV 03-4260
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
TIM REISCH, Secretary of Corrections for South Dakota; DOUGLAS L. WEBER, Chief Warden for the Department of Corrections of South Dakota; DENNIS BLOCK, Associate Warden for the South Dakota State Penitentiary; JENNIFER WAGNER a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary; DOUG LOEN, Policy Analyst for the South Dakota State	*	MEMORANDUM OPINION AND ORDER

Penitentiary; DARYL	*
SLYKHUIS, Interim	*
Warden of the South	*
Dakota State	*
Penitentiary;	*
JOHN/JANE DOE	*
STAFF	*
MEMBERS, AGENTS,	*
EMPLOYEES AND/OR	*
OFFICERS OF THE	*
SOUTH DAKOTA	*
STATE	*
PENETENTIARY	*
AND/OR SOUTH	*
DAKOTA	*
DEPARTMENT OF	*
CORRECTIONS; all	*
Defendants sued in both	*
their individual and	*
official capacities,	*
	*
Defendants.	*
	*

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Pending before the Court are Defendants' Motion to Strike, Doc. 272, and Defendants' Motion for Summary Judgment, Doc. 214, on the grounds of qualified immunity and the merits. In a separate brief, Defendants also seek summary judgment on any claims asserted under the Religious Land

Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-2000cc-5, on the grounds that RLUIPA is unconstitutional. The Court allowed the United States to intervene for presentation of evidence and for argument on the question of the constitutionality of RLUIPA. The United States filed a brief in opposition to the Defendants' constitutional challenge to RLUIPA. After repeated continuances, Plaintiff Charles Sisney, who was represented by counsel, filed a brief regarding the constitutionality of RLUIPA and a separate brief addressing qualified immunity and the merits. Defendants filed reply briefs. For the reasons set forth below, the Court will grant in part and deny in part Defendants' summary judgment based on qualified immunity and the merits and will deny Defendants' summary judgment motion challenging the constitutionality of RLUIPA. The Motion to Strike will be denied.

I. BACKGROUND

The facts will be stated in the light most favorable to Sisney, as the non-moving party in these summary judgment proceedings. Sisney is serving a life sentence at the South Dakota State Penitentiary ("SDSP"). He has been incarcerated at the SDSP since April 11, 1997. He was convicted of first-degree murder, but he has no history of violence or assaultive behavior while incarcerated in the SDSP. His

security classification is high/medium risk. He now practices the Jewish faith and he brought this action alleging various violations of his religious freedom rights, right to equal protection of the laws, retaliation and denial of access to the courts. He began learning and studying about Judaism before he was incarcerated, but does not claim he was practicing the Jewish faith before his incarceration.

Defendant Tim Reisch is the Secretary of the South Dakota Department of Corrections ("DOC"). Reisch is the final policy maker regarding DOC policies, rules and regulations. Defendant Douglas Weber is the Warden of the SDSP. Weber is the final policy maker regarding Operational Memoranda, which are the policies and operational guidelines in place at the SDSP. Defendant Daryl Slykhuis served as the Interim Warden of the SDSP at the time of the event alleged in Sisney's Amended Supplemental Complaint (Doc. 63). Defendant Dennis Block is an Associate Warden at the SDSP, and he is the official who approves or disapproves inmates' requests regarding religious and cultural activities. Defendant Jennifer Wagner, a/k/a Jennifer Lane, is the Cultural Activities Coordinator for the SDSP. She is the SDSP official that first reviews inmates' requests regarding religious and cultural activities, which are submitted on a

form entitled "Project Application". If Wagner believes the Project Application involves security issues, she brings the application to the attention of Block for his review. These Project Applications may also be discussed at weekly meetings, which Block, Weber and other senior SDSP officials attend. Defendant Doug Loen is Legal Counsel for the DOC. His office is located at the SDSP. He is responsible for drafting policies and procedures under the direction, supervision and control of the Secretary of Corrections and the Wardens. Loen is not the final policymaker on either DOC policies or Operational Memoranda and he does not possess supervisory authority over SDSP correctional officers.

Sisney asserts various claims against each of the Defendants. Several claims have been dismissed from this action and the Court ruled on Defendants' Motion for Summary Judgment on the grounds of failure to exhaust administrative remedies. Two claims were dismissed for failure to exhaust administrative remedies, which were Sisney's claims that Defendants lied in internal state investigations and that Defendants conspired to conceal unlawful discrimination against Sisney. (Doc. 212.) The claims remaining in this action are set forth in Sisney's Amended Complaint (Doc. 60), excluding paragraphs 111-121, 126, 129 and 130, and in paragraphs 6,

13-20, and 54-55 of the Amended Supplemental Complaint II (Doc. 63). Sisney contends the Defendants have violated the First Amendment and RLUIPA by: (1) their refusal to allow Sisney to erect and use a succah or Sukkot Booth during the Festival of Sukkot; (2) their refusal to establish a permanent Jewish chapel; (3) their denial of additional service time for group Torah, Kabalistic and language studies; (4) their refusal to use the Benevolence Fund to assist the Jewish group in obtaining a Rabbi to visit the inmates; (5) their interference with a visit by rabbinical students; (6) their refusal to allow Sisney to possess certain personal property for the exercise of his religion; and (7) refusal of Sisney's request to review what he refers to as the "Jewish curriculum" maintained by the Cultural Activities Coordinator. The property claims involve the following items: succah, charity box, tape player, religious calendar, herbs and oils, lightbulb diffuser, incense in chapel, and tzit-tzit string. Retaliation claims are asserted by Sisney against Wagner and Slykhuis. Equal Protection claims are asserted by Sisney for the refusal to allow Sisney to erect a succah, for denial of kosher coffee, and the denial of tzit-tzit string to repair Sisney's tzit-tzit shirt. Sisney also claims Defendants Slykhuis and Loen denied him access to the courts.

Defendants Reisch and Weber seek summary judgment on the grounds that the record does not show sufficient personal involvement regarding Sisney's claims, and, in the alternative, their actions were constitutional. All Defendants seek summary judgment on the merits of Sisney's claims, or, in the alternative, they seek the protection of qualified immunity. As to Sisney's state-law claims, Defendants contend the Court should decline to consider them, but if the Court does consider these claims Defendants urge the Court to deny relief on all of the claims.

Sisney counters that Reisch and Weber were personally aware of the claimed violations of his rights and did nothing to correct the other Defendants' unconstitutional actions. He wrote two letters to Reisch explaining his complaints and he filed several grievances with Weber addressing the claims in this action. Sisney further contends Defendants are not entitled to summary judgment on the merits of his claims and that they are not entitled to qualified immunity. Sisney points out that his state-law claims were dismissed by the Court. The Court agrees there are no longer any state-law claims in this action because all such claims, stated in Sisney's Amended Complaint, Doc. 60, were dismissed for failure to exhaust administrative remedies. *See* Memorandum Opinion and Order, Doc. 212.

II. DISCUSSION

In considering a motion for summary judgment, the Court asks the question whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). "Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and 'by affidavit or otherwise' designate 'specific facts showing that there is a genuine issue for trial'" *Commercial Union Ins. Co. v. Schmidt*, 967 F.2d 270, 271 (8th Cir. 1992) (quoting FED.R.CIV.P. 56(e)). Simply creating a factual dispute cannot defeat a motion for summary judgment; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit. *See, e.g., Ghane v. West*, 148 F.3d 979, 981 (8th Cir. 1998). "A plaintiffs verified . . . Complaint is the equivalent of an affidavit for purposes of summary judgment, and a complaint signed and dated as true under penalty of perjury satisfies the requirements of a verified complaint." *Roberson v. Hayti Police Dep't*, 241 F.3d 992, 994-95 (8th Cir. 2001) (citations omitted). If the allegations in the verified complaint consist of nothing more than conclusory allegations, however, they are insufficient to overcome a summary judgment

motion. *See Roberson v. Bradshaw*, 198 F.3d 645, 647 (8th Cir. 1999).

Sisney brings claims under both 42 U.S.C. § 1983 and RLUIPA. RLUIPA was enacted in 2000 after the Supreme Court declared the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, unconstitutional as applied to states and localities in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See Cutter v. Wilkinson*, 544 U.S. 709, 714-15 (2005) (setting forth the history of the enactment of RFRA and RLUIPA). RLUIPA is similar to, but not identical to, RFRA. *See id.* at 715-16.

A. Supervisory Liability

Defendants Reisch and Weber contend they were not directly or personally involved in the actions or events Sisney challenges as unlawful. The Court agrees with Defendants Reisch and Weber's argument that they cannot be held liable on the theory of respondeat superior. *See Choate v. Lockhart*, 7 F.3d 1370, 1376 (8th Cir. 1993). "In the section 1983 context, supervisor liability is limited." *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995). "'For a supervisor to be held liable for the acts of a subordinate, something more must be shown than merely the existence of the supervisor-subordinate, relationship.'" *Ripson v. Alles*, 21 F.3d 805, 809 (8th Cir. 1994) (quoting *Clay v. Conlee*, 815 F.2d 1164, 1170

(8th Cir. 1987)). "'The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what he might see.'" *Id.*

Sisney does not, however, seek to hold Reisch and Weber liable solely on a theory of respondeat superior. Rather, Sisney alleges these two Defendants were personally aware of the alleged unlawful conduct by the other Defendants and they did not take appropriate action to end such conduct by their subordinates. As to Reisch, Sisney is not allowed to file grievances with Reisch, but Sisney did write two letters to Reisch explaining his allegations of discrimination and restrictions on the exercise of his religion. Although Reisch is expected to know the law, Sisney included a copy of RLUIPA with the letters sent to Reisch. After receiving Sisney's letters, Reisch contacted the SDSP regarding Sisney's concerns. Reisch states he was satisfied after that contact that SDSP staff were working to accommodate Sisney's requests and yet maintain institutional security, safety and order. Reisch took no further action to ensure that Sisney's right to exercise his religion was not being substantially burdened.

Weber was made aware of all of Sisney's claims in this action through the prison grievance system. Weber denied all of the Requests for Administrative Remedy and was

the final administrative appeal Sisney could pursue for his requests at issue in this lawsuit. Unlike the prisoner plaintiff in *Boyd*, Sisney has produced evidence to show that both Reisch and Weber knew about Sisney's allegations of discrimination and constitutional deprivations, and has produced evidence to show that despite this knowledge they condoned the denial of Sisney's requests at issue in this action, which he contends imposed a substantial burden on the exercise of his religion. *See Boyd*, 47 F.3d at 969 (granting summary judgment in favor of prison supervisors because the inmate plaintiff failed to "offer any proof that the two supervisors knew about his condition, let alone that they were deliberately indifferent to his serious medical needs."). In light of Weber and Reisch's alleged personal involvement and knowledge regarding Sisney's requests for religious accommodation, they are not entitled to summary judgment on the grounds that Sisney is seeking to hold them liable solely in their supervisory capacities.

B. Individual and official capacity claims under § 1983

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487

U.S. 42,48 (1988) (citations omitted). Sisney has alleged several violations of the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and has asserted claims for retaliation and denial of access to the courts. He has also raised an independent statutory claim under RLUIPA, which is subject to a different standard than his constitutional claims regarding the exercise of his religion. As to the constitutional claims under § 1983, it is clear that all Defendants acted under color of state law. *See id.* at 49-50 (stating "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.").

All Defendants are sued in both their individual and official capacities. All claims for monetary damages against the Defendants in their official capacities are claims against the State of South Dakota. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531,535 (8th Cir. 1999). Damages claims against the State are barred by the Eleventh Amendment, unless South Dakota consented to suit or Congress abrogated its immunity. *See Kentucky v. Graham*,473 U.S. 159, 169 (1985) (absent waiver by the State of South Dakota or valid override by Congress, "the Eleventh Amendment bars a damages action against a State in federal court"); South Dakota

Constitution, Article III, Section 27; SDCL § 3-22-17, (the State of South Dakota has not waived its Eleventh Amendment immunity for damages actions in federal court). South Dakota has not consented to suit under 42 U.S.C. § 1983 and Congress has not abrogated South Dakota's Eleventh Amendment immunity under § 1983. Accordingly, all claims for monetary damages against the Defendants in their official capacity under 42 U.S.C. § 1983 are barred. Claims for monetary damages under RLUIPA are discussed below.

The only situation in which state officials acting in their official capacities will be considered "persons" for purposes of § 1983, and the Eleventh Amendment will not bar the § 1983 claim, is where the plaintiff is seeking prospective relief. *See Murphy v. Arkansas,* 127 F.3d 750, 754 (8th Cir. 1997). Sisney seeks prospective relief in this action. Accordingly, the § 1983 official-capacity claims on which Sisney seeks prospective relief are not barred by the Eleventh Amendment.

Although the official-capacity § 1983 claims seeking monetary damages against the Defendants are barred by the Eleventh Amendment, "damages awards against individual defendants in federal courts 'are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.' That is, the Eleventh Amendment does

not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983." *Hafer v. Melo*, 502 U.S. 21, 3031 (1991) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974)). State officials sued in their individual capacities may assert personal immunity defenses such as qualified immunity. *See Hafer*, 502 U.S. at 25. All Defendants are sued in their individual capacity for monetary damages, including compensatory, nominal and punitive damages. Therefore, the Court will consider the individual capacity § 1983 claims against the Defendants, including their qualified immunity defenses.

C. Individual and official capacity claims under RLUIPA

Sisney seeks to hold Defendants liable in both their individual and official capacities under RLUIPA. If the Court upholds the constitutionality of RLUIPA, Defendants contend it may only be constitutionally applied to provide a narrow class of remedies, for a narrow class of claims, against a narrow class of defendants. Defendants contend that only official capacity claims for prospective or injunctive relief against the State or final policymakers may be maintained under RLUIPA, because prospective relief is not available against them in their individual capacities. Defendants' position is that the Eleventh Amendment bars claims for money

damages against the States or against State officials sued in their official capacities, thus limiting relief under RLUIPA to prospective relief against Defendants in their official capacities. Moreover, Defendants contend Defendant Weber, as the final policy maker regarding the policies at issue in this lawsuit, is the only proper defendant to the RLUIPA claims in this action. Finally, Defendants contend the Court lacks jurisdiction over Sisney's RLUIPA claim because he has not established that the government's programs or activities receive federal financial assistance or that the government's actions are in some way affecting interstate commerce. *See* 42 U.S.C. § 2000cc-1(b).

Sisney asserts he can recover both monetary damages and injunctive relief for RLUIPA violations against Defendants in both their official and individual capacities. He contends monetary damages are allowed on the official capacity RLUIPA claims because the State of South Dakota's Eleventh Amendment immunity is waived pursuant to the Civil Rights Remedies Equalization Act of 1986 (the "Equalization Act"), 42 U.S.C. § 2000d-7, and the text of RLUIPA permits the recovery of monetary damages.

RLUIPA's remedial provision states in relevant part, "A person may assert a violation of this chapter as a claim or defense

in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The term "government" under RLUIPA is defined as: "(I) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (I); and (iii) any other person acting under color of State law[.]" 42 U.S.C. § 2000cc-5(4). There is a division of authority among the federal courts of appeals and district courts regarding whether RLUIPA authorizes an award of monetary damages, in addition to equitable relief; whether individual capacity suits for monetary damages are allowed under RLUIPA; and whether official capacity suits under RLUIPA for monetary damages are barred by the Eleventh Amendment.

The Eighth Circuit has not decided any of these issues. In *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979 (8th Cir. 2004), the Eighth Circuit reversed the District Court's grant of summary judgment to prison officials on the plaintiff prisoner's RLUIPA claims. The prisoner in *Murphy* sought monetary relief, *see* 372 F.3d at 982, but the panel did not address the availability of such relief in reversing the District Court. The issue of individual versus official capacity claims was not address in *Murphy*, and Eleventh Amendment immunity was not discussed.

Some courts, including two district courts in the Eighth Circuit, have allowed prisoner claims for monetary damages under RLUIPA to proceed, but did not explicitly decide the question or discuss the split of authority on whether RLUIPA authorizes such relief. *See Shabazz v. Norris*, 2007 WL 2819517 (E.D. Ark. Sept. 26, 2007) (allowing action for recovery of monetary damages under RLUIPA to proceed, but limiting relief to nominal damages under 42 U.S.C. § 1997e(e)); *El-Tabech v. Clarke*, 2007 WL 1487148, at *3 (D. Neb. May 18, 2007) (noting prisoner plaintiffs sought monetary relief for alleged RLUIPA violations, but not explicitly deciding whether monetary relief is available under RLUIPA); *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (collecting cases where district courts have "assumed that money damages are available, without actually deciding the question."). Another district court within the Eighth Circuit found the individual prison officials were subject to suit under RLUIPA because they were "official[s] of an entity" under 42 U.S.C. § 2000cc5(4)(A)(ii), but it is not clear whether the court found prison officials were subject to a monetary damages claim in both their individual and official capacities. *See Robinson v. Kempker*, 2007 WL 1385700, at *5-6 (E.D. Mo. May 8, 2007). There is a wide division of authority on all of these issues among the circuit and district courts. For the reasons set forth below, the

Court concludes that individual capacity claims are not allowed under RLUIPA, that South Dakota's Eleventh Amendment immunity does not bar claims for monetary damages under RLUIPA on official capacity claims, pursuant to the Equalization Act, and the remedies provision in RLUIPA allowing a recovery of "appropriate relief against a government" includes the potential of recovering monetary damages against the State of South Dakota on the official capacity claims.

1. Individual capacity claim for monetary damages under RLUIPA

Several courts have held that individual capacity claims are not permitted under RLUIPA. *See Smith*, 502 F.3d at 1271-75 (discussing at length the issue of individual capacity claims under RLUIPA and concluding that "section 3 of RLUIPA - a provision that derives from Congress' Spending Power - cannot be construed as creating a private action against individual defendants for monetary damages."); *Daker v. Ferrero*, 475 F. Supp. 2d 1325, 1335-47 (N.D. Ga. 2007), *vacated in part on other grounds*, 506 F.Supp.2d 1295 (N.D. Ga. 2007) (same); *Boles v. Neet*, 402 F. Supp. 2d 1237, 1240 (D. Colo. 2005) (interpreting 42 U.S.C. § 2000cc-2(a) "to permit cases against a governmental entity, but not against an individual officer, except perhaps in his or her official capacity.") (citing

Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1067 (D. Haw. 2002) ("RLUIPA provides a cause of action against 'government' and does not appear to allow causes of action against individuals."); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1128, 1136 (E.D. Cal. 2003) (finding that the term "government" includes an official of the entity, and therefore permits suit against the official at least in his or her official capacity); *Rowe v. Davis*, 373 F. Supp. 2d 822, 828 (N.D. Ind. 2005) (RLUIPA claim may proceed against correctional officer or his successor on an official capacity basis)).

Other courts have held individual capacity claims are allowed under RLUIPA. These courts have held that the definition of "a government" under RLUIPA includes individual government officials and "any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4)(A)(ii-iii); *see Agrawal v. Briley*, 2006 WL 3523750, at *9-13 (N.D. Ill. Dec. 6, 2006); *Marsh v. Granholm*, 2006 WL2439760, at *10-11 (W.D. Mich. Aug. 22, 2006). The district court in *Agrawal*, concluded that "[i]f RLUIPA authorized only official-capacity claims, subsection (iii) would have no purpose because subsection (ii) already authorizes claims against government 'officials.' *See* 42 U.S.C. § 2000cc-5(4)(A)(ii)." *Agrawal*, 2006 WL 3523750, at *11. Other

district courts have allowed individual capacity suits for money damages under RLUIPA following the same rationale. *See Marsh*, 2006 WL2439760, at *10-11 (following the decision in *Daker v. Ferrero*, 2006 WL 346440 (N.D. Ga. Feb. 13, 2006), in holding that while § 2000cc-2(a) "does not explicitly permit individual capacity suits for money damages, it does not explicitly preclude them either."); *Orafan v. Goord*, 2003 WL 21972735, at *9 (N.D.N.Y. Aug. 11, 2003) (interpreting the "plain language" of § 2000cc5(4)(A) to contemplate individual liability).

The Eleventh Circuit, however, found a flaw with the district court decisions finding the inclusion of "any other person acting under color of State law," in § 2000cc-5(4)(A)(iii) authorizes individual capacity suits for money damages. *See Smith*, 502 F.3d at 1272-75. The flaw is that RLUIPA was enacted pursuant to Congress' Spending Power under Article I of the Constitution and "Congress cannot use its Spending Power to subject a non-recipient of federal funds, including a state official acting [in] his or her individual capacity, to private liability for monetary damages." *Id.* at 1272-73. Prior to the Eleventh Circuit's decision in *Smith*, *supra*, the district court in the Northern District of Georgia examined this rationale in detail in *Daker*, 475 F. Supp. 2d at 1335-42, and likewise concluded Section 3 of RLUIPA

does not authorize money damages against prison officials in their individual capacities.

Although the Eighth Circuit has not addressed individual capacity liability under RLUIPA, it held that because Title IX was enacted under the Spending Clause, "Title IX will not support an action against [a school official] in her individual capacity." *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610-11 (8th Cir. 1999). This is the same rationale adopted by the Eleventh Circuit in *Smith, supra*, and the Northern District of Georgia in *Daker*, 475 F. Supp. 2d at 1335-42, for rejecting individual capacity liability under RLUIPA. Given the Eighth Circuit's holding in *Kinman,* the Court agrees with the Eleventh Circuit's decision in *Smith,* that, "section 3 of RLUIPA - a provision that derives from Congress' Spending Power - cannot be construed as creating a private action against individual defendants for monetary damages." 502 F.3d at 1275.[8]

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[8] Likewise, the Court agrees with the Eleventh Circuit that despite the reference to Congress' Commerce Clause Power in 42 U.S.C. § 2000cc-l(b), RLUIPA "hinges on Congress' Spending Power rather than its Commerce Clause Power." *Smith*, 502 F.3d at 1274 & n.9; *see Daker*, 475 F. Supp. 2d at 1342-47 (concluding that construing Section 3 of RLUIPA to authorize money damages actions against prison officials in their individual capacity based upon Congress' use of its power under the Commerce Clause would raise "serious constitutional concerns.").

2. Official capacity claim for monetary damages and Eleventh Amendment immunity under RLUIPA

In this section, the Court will address the questions of whether the State of South Dakota is entitled to Eleventh Amendment immunity from monetary damages and, if not, whether monetary damages are recoverable under RLUIPA. The Supreme Court declared that federal courts are to "'find waiver [of sovereign immunity] only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 (1999) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal quotation marks omitted)). Stated in another way, "'an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language.'" *Id.* (quoting *Welch v. Texas Dep't of Highways and Pub. Transp.* 483 U.S. 468, 478 & n. 8 (1987)).

Similar to individual capacity claims, there is a division of authority among federal courts regarding whether the Eleventh Amendment bars recovery of monetary damages for official capacity claims under RLUIPA. Two federal courts of appeal have ruled on this issue, as well as several district courts. The Eleventh Circuit held the

Eleventh Amendment does not bar a recovery of monetary damages against a prison official in his or her official capacity. *See Smith*, 502 F.3d at 1276 & n12. In *Smith*, the Eleventh Circuit stated that in *Benning v. Georgia*, 391 F.3d 1299, 1305 (11th Cir. 2004), it "held that section 3 of RLUIPA effectuated a clear waiver of the state's sovereign immunity under the Eleventh Amendment[.]" In *Benning*, without any significant analysis, the Eleventh Circuit stated: "Congress unambiguously required states to waive their sovereign immunity from suits filed by prisoners to enforce RLUIPA" 391 F.3d at 1305. The Eleventh Circuit concluded in *Smith*, that in light of this holding in *Benning*, "the Eleventh Amendment will not shield the state (and its agents) from an official capacity action for damages under RLUIPA." 502 F.3d at 1276 & n.12.

At least one district court has agreed with the Eleventh Circuit that the Eleventh Amendment does not bar monetary damages under RLUIPA against states and state officials in their official capacities. *See Price v. Caruso*, 451 F. Supp. 2d 889, 902 (E.D. Mich. 2006) (finding that Congress required States to waive their sovereign immunity under RLUIPA, including suits for money damages, in exchange for accepting federal prison funding).

Contrary to the Eleventh Circuit, the Fourth Circuit held the Eleventh Amendment immunity for official capacity claims for monetary damages is not waived in RLUIPA. *See Madison v. Virginia*, 474 F.3d 118, 130-33 (4th Cir. 2006). In *Madison*, the Fourth Circuit cited the Eleventh Circuit's decision in Benning, and recognized that, "[b]y voluntarily accepting federal correctional funds, [the State of Virginia] consented to federal jurisdiction for at least some form of relief." *Madison*, 474 F.3d at 130 (citing *Benning*, 391 F.3d at 1306). The Fourth Circuit held, "[t]hat RLUIPA unambiguously conditions federal prison funds on a State's consent to suit, however, does not end our inquiry. Congress is, of course, free to condition funds upon a waiver of 'sovereign immunity against liability without waiving [a State's] immunity from monetary damages awards." *Madison*, 474 F.3d at 131 (quoting *Lane v. Pena*, 518 U.S. 187, 196 (1996); *see Lovelace v. Lee*, 472 F.3d 174, 193-94 (4th Cir. 2006) (following *Madison, supra,* and rejecting claim for monetary damages against prison official in his official capacity). The Fourth Circuit concluded that "RLUIPA's 'appropriate relief against a government' language falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages." *Madison*, 474 F.3d at 131.

Several district courts have held that the Eleventh Amendment bars claims for monetary damages against states and state officials in their official capacity, including two district courts in the Eighth Circuit. *See Toler v. Leopold*, 2007 WL 2907889, at *1 (E.D. Mo. Oct. 1, 2007) (granting summary judgment on prisoner's RLUIPA claims for monetary damages against the Missouri Department of Corrections and following *Madison*, 474 F.3d at 131, in finding the "appropriate relief against a government" provision in RLUIPA "falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages."); *Toler v. Leopold*, 2007 WL 2238661, at *5 (E.D .Mo. Jul. 31, 2007) (same and granting summary judgment to individual prison officials on prisoner's RLUIPA claims for monetary damages against them in their official capacities); *Dean v. Blum*, 2007 WL 2264615, at *7 (D. Neb. Aug. 6, 2007) (holding that the Eleventh Amendment bars official capacity claims for monetary damages under RLUIPA, but not discussing whether Nebraska consented to suit under RLUIPA); *Nelson v. Miller*, 2007 WL 294276, at *9 (S.D. Ill. Jan. 30, 2007) (finding that: (a) Congress cannot abrogate a state's Eleventh Amendment immunity under RLUIPA, because it was enacted pursuant to Congress' Article I power; and (b) that Congress did not unambiguously express its intent in RLUIPA

that a state must waive its sovereign immunity as to suits for money damages if the state accepts federal prison funds); *Agrawal*, 2006 WL 3523750, at *5-9 (disagreeing with the Eleventh Circuit's decision in *Benning, supra*, and finding that RLUIPA does not "demonstrate a clear intent to require a state to waive its immunity in exchange for its receipt of federal funds."); *Bilal v. Lehman*, 2006 WL 3626808, at *5 (W.D. Wash. Oct. 2, 2006) (recognizing that "a state's immunity to suits by private citizens is . . . subject to the exception that a state may consent to suit," but finding Washington "has not expressly waived its immunity in regard to [the prisoner's] § 1983 and RLUIPA claims.").

The Court does not agree with the Eleventh Circuit and the district court for the Eastern District of Michigan that by entering into a funding contract with the Federal government by accepting federal prison funds ipso facto waives the State's Eleventh Amendment immunity for monetary damages under RLUIPA. Rather, Congress must use "unmistakably clear language" to effect such a waiver. *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 478 & n.8 (1987). The Court agrees with the Fourth Circuit's observation that, "general participation in a federal program or the receipt of federal funds is insufficient to waive sovereign immunity." *Madison*, 474 F.3d at

130 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985)).

In addition to the above case law on RLUIPA, analogous case law considering the federal government's sovereign immunity under RFRA is instructive. Although RLUIPA and RFRA are not identical, the remedial provision allowing "appropriate relief against a government" is the same in both statutes. *See* 42 U.S.C. § 2000cc-2(a) (RLUIPA provides: "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."); and 42 U.S.C. § 2000bb-1(c) (RFRA provides: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."). Examining this remedial language, the District of Columbia Circuit held the United States' sovereign immunity for monetary damages was not waived in RFRA:

> On its face, RFRA's reference to 'appropriate relief' is not the "sort of unequivocal waiver that our precedents demand," *Lane*, 518 U.S. at 198, because that broad term is susceptible to more than one interpretation. In some

> contexts, 'appropriate relief' might include damages. *Cf. West v. Gibson*, 527 U.S. 212, 222-23, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999) (holding that Title VII's reference to "appropriate remedies" contemplates compensatory damages where a statutory cross-reference explicitly authorizes them). However, another plausible reading is that "appropriate relief' covers equitable relief but not damages, given Congress's awareness of the importance of sovereign immunity and its silence in the statute on the subject of damages. We cannot find an unambiguous waiver in language this open-ended and equivocal.

Webman v. Federal Bureau of Prisons, 441 F.3d 1022, 1026 (D.C. Cir. 2006).

Although Webman involved the United States' sovereign immunity, Congress must use the same type of unequivocal language if it intends to impose waiver of a State's sovereign immunity as a condition for accepting federal funds. The Supreme Court equated federal sovereign immunity to State's sovereign immunity in discussing the

unequivocal language Congress must use if it intends that States must waive their immunity if they take certain actions:

> [I]n the context of *federal* sovereign immunity - obviously the closest analogy to [*state* sovereign immunity] - it is well established that waivers are not implied. *See, e.g., United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

College Sav. Bank, 527 U.S. at 682.

The Court finds Congress did not unambiguously require a State to waive its Eleventh Amendment immunity for monetary damages under RLUIPA by accepting federal prison funds. Like the *Webman* court found as to RFRA, "appropriate relief" might include the recovery of monetary damages, but an equally plausible interpretation is that it refers solely to equitable relief. 441 F.3d at

1026. Accordingly, the Court agrees with the Fourth Circuit in *Madison*, 474 F.3d at 131, and the Northern District of Illinois in *Agrawal*, 2006 WL 3523750, at *9, to the extent that they found a State's Eleventh Amendment immunity to an official capacity claim for monetary damages is not waived by unmistakably clear language in the text of RLUIPA.

That a State's Eleventh Amendment immunity is not waived by the text of RLUIPA, however, does not end the inquiry. Sisney contends the Civil Rights Remedies Equalization Act of 1986 ("the Equalization Act"), 42 U.S.C. § 2000d-7, contains the required unequivocal waiver of state sovereign immunity. That statute provides in relevant part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting

> discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(l). The Fourth Circuit examined the potential applicability of the Equalization Act to RLUIPA. Finding that RLUIPA is not like the statutes expressly listed in the Equalization Act, the Fourth Circuit held, "it is not clear that RLUIPA is a 'Federal statute prohibiting discrimination' and ambiguity again defeats plaintiffs claim that Virginia, by accepting federal funds, knowingly consented for damages actions to be brought against it." *Madison*, 474 F.3d at 133. The Court does not find the rationale in *Madison, supra,* persuasive on this issue. RLUIPA was enacted, in part, to prohibit discrimination by prison officials against prisoners who desire to exercise their religious beliefs. The Seventh Circuit observed that: "RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.'" *Charles v. Verhagen*, 348 F.3d 601,607 (7th Cir. 2003) (quoting *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002)). The right to exercise one's religion is clearly a fundamental freedom and Congress found that prison officials were discriminating against prisoners who sought to exercise their religious beliefs.

Accordingly, the Court finds that RLUIPA is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance", and the Court agrees with Sisney that South Dakota's sovereign immunity for monetary damages on official capacity claims under RLUIPA is waived under the Equalization Act by its acceptance of federal prison funding. 42 U.S.C. § 2000d-7(a)(l).

Having concluded the State is not immune from monetary damages by operation of the Eleventh Amendment, the next question becomes whether RLUIPA itself allows for the recovery of monetary damages. The remedies provision in RLUIPA allows an inmate to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). For Congress to authorize the recovery of monetary damages in a statute, it is not required to use the same unequivocal language necessary for a finding of waiver of Eleventh Amendment immunity. The Eleventh Circuit examined in depth the issue of whether RLUIPA authorizes an award of monetary damages, and concluded that the use of the phrase "appropriate relief" in RLUIPA, 42 U.S.C. § 2000cc(a), "is broad enough to encompass the right to monetary damages in the event a plaintiff establishes a violation of the statute. Congress expressed no intent to the contrary within RLUIPA, even though it could have, by, for example, explicitly limiting

the remedies set forth in § 2000cc(a) to injunctive relief only." *Smith*, 502 F.3d at 1269-71. The *Smith* court assumed that in using the broad, general language of "appropriate relief" in RLUIPA, Congress was aware of the "presumption in favor of making all appropriate remedies available to the prevailing party," established by the Supreme Court in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992), and its progeny. *Smith*, 502 F.3d at 1270-71. Accordingly, the Eleventh Circuit stated "[i]n light of that presumption, we conclude that, absent an intent to the contrary, the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief." *Id.* at 1271.

Even if RLUIPA did not contain the remedies provision allowing an inmate to "obtain appropriate relief against a government", the Supreme Court's decision in *Barnes v. Gorman*, 536 U.S. 181, 187, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002), provides authority for the Court's holding that RLUIPA authorizes the recovery of compensatory damages. RLUIPA was enacted under Congress' Spending power and in discussing Spending Clause legislation, the Supreme Court held that: A funding recipient is generally on notice that it is subject to those remedies traditionally available in suits for breach of contract. Thus

we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages and injunction, forms of relief traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187. Congress did not preclude an award of monetary damages under RLUIPA, which is Spending Clause legislation, and pursuant to *Barnes*, the State of South Dakota would have been on notice that it is subject to that remedy because an award of compensatory damages is a form of relief traditionally available in suits for breach of contract.

The Fourth and District of Columbia Circuits also recognized that the phrase "appropriate relief" could be interpreted to include an award of monetary damages. See *Madison*, 474 F.3d at 13132 (finding that the phrase "appropriate relief" could be interpreted in different ways and that it "might be read to include damages[.]"); *Webman*, 441 F.3d at 1026 (finding that the phrase "appropriate relief" is "susceptible to more than one interpretation" and that in some contexts it could include monetary damages). Despite the Court's disagreement with the Eleventh Circuit on the question of sovereign immunity, the Court does agree with the Eleventh Circuit's decision that the phrase "appropriate relief' in RLUIPA

encompasses the recovery of monetary damages.9 *See Smith*, 502 F.3d at 1269-71.

For the reasons set forth above, the Court concludes the State of South Dakota's Eleventh Amendment immunity is waived

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9 The Court notes the decision in *Smith* demonstrates the difference in the analysis of the question whether a statute allows for recovery of monetary damages compared to the question whether a statute waives a State's Eleventh Amendment immunity for monetary damages. The Court finds that although the phrase "appropriate relief' in RLUIPA allows for an award of monetary damages due to the presumption in *Franklin, supra*, that same presumption in *Franklin, supra*, may not override a government's sovereign immunity from monetary damages. The Supreme Court found the "general rule" in *Franklin*, did not apply when considering whether Congress waived the United States' sovereign immunity against monetary relief for violating Section 504(a) of the Rehabilitation Act of 1973. *See Lane v. Pena*, 518 U.S. 187, 196-97 (1996). The Supreme Court noted the defendants in *Franklin*, were nonfederal defendants and that the "Federal Government's sovereign immunity prohibits wholesale application of *Franklin* to actions against the Government to enforce § 504(a)." *Id.* In the present case, the Defendants in their official capacities are government defendants, unlike the defendants in *Franklin, supra.* Similar to the Supreme Court in *Lane, supra*, the Court does not find the presumption in *Franklin* regarding the extent of available remedies is applicable when determining whether Congress has validly required States to waive their sovereign immunity for monetary damages by accepting federal funds.

under the Equalization Act, 42 U.S.C. § 2000d-7(a), due to its acceptance of federal prison funds, and that RLUIPA allows the potential for recovery of monetary damages against the State on his official capacity RLUIPA claims.

3. Monetary damages are limited under the PLRA

The Prisoner Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(e), states: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." *Id.* Some courts that have held monetary relief is authorized by RLUIPA, also find such damages are limited by the PLRA to the extent the prisoner plaintiff has not made a showing of physical injury in addition to mental or emotional injury. *See Smith*, 502 F.3d at 1269-71 (collecting cases). RLUIPA addresses the application of the PLRA: "Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act)." 42 U.S.C. § 2000cc-2(e). By this provision, Congress clearly anticipated the PLRA would apply to RLUIPA claims. In the present case, Sisney has not alleged he suffered any physical injury as a result of Defendants' actions in

this case. Accordingly, Sisney is limited to recovery of nominal damages on his official capacity RLUIPA claims. *See Royal v. Kautzky*, 375 F.3d 720, 724 (8th Cir. 2004) (holding that an inmate may recover an award of nominal damages under the PLRA despite the lack of a physical injury).

The PLRA further restricts a prevailing prisoner plaintiff to "an award of attorney fees for 150 percent of the damages award." *Royal*, 375 F.3d at 725 (citing 42 U.S.C. § 1997e(d)(2)). "[O]ne dollar is recognized as an appropriate value for nominal damages." *Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005). Accordingly, if Sisney recovers $1.00 for nominal damages he will be restricted to recovering $1.50 for his attorney fees. *See id.* In view of the Congressional allowance of substantial attorney fees in other civil cases where nominal or limited damages are awarded, it could be that $1.50 in attorney fees is an unintended consequence.

Punitive damages are also sought on the RLUIPA claims. Even if punitive damages were available on the official capacity RLUIPA claims, which the Court is not deciding in this action, the Court finds no evidentiary basis for an award of punitive damages in this case as there is no evidence in this record that Defendants' actions were "'motivated by evil motive or intent, or . . .

involve[d] reckless or callous indifference to the federally protected rights'" of Sisney. *Id.* at 724 (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).

D. Motion to Strike

For various reasons Defendants moved to strike Sisney's Affidavit and attachments, Doc. 247, that were filed in support of his resistance to Defendants' summary judgment motion. The Eighth Circuit explained that in ruling on a summary judgment motion, "[w]e consider only admissible evidence and disregard portions of various affidavits and depositions that were made without personal knowledge, consisted of hearsay, or purported to state legal conclusions as facts." *Murphy*, 372 F.3d at 982. Certain portions of Sisney's Affidavit and attachments contain statements made without personal knowledge, consist of hearsay and purport to state legal conclusions as facts. Rather than strike Sisney's Affidavit and attachments from the record, however, the Court will disregard those portions that are not admissible evidence. Accordingly, Defendants' motion to strike will be denied.

E. Merits of RLUIPA Claims

"By enacting RLUIPA, Congress established a statutory free exercise claim encompassing a higher standard of review than that which applies to constitutional free

exercise claims." *Murphy*, 372 F.3d at 986. The applicable statute provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-l(a). A threshold matter Sisney is required to establish, is that there is a substantial burden on his ability to exercise his religion. *See* 42 U.S.C. § 2000cc-2(b)[10]. In

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10 42 U.S.C. § 2000cc-2(b), provides as follows:

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the

2004, the Eighth Circuit held that to meet this threshold showing, the government policy or actions:

> must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion."

Murphy, 372 F.3d at 988 (quoting *Wierv. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)). Thus, the Eighth Circuit directed that courts determine whether the conduct or expression constrained by prison officials was a "central tenet" of or "fundamental" to the prisoner's religion. In *Cutter*, however, the Supreme Court explained that, "RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion." 544 U.S. at 725 & n.13 (citing 42 U.S.C. § 2000cc-5(7)(A)). In determining that courts are not to look to

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law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiffs exercise of religion.

the centrality of the belief or practice, the Supreme Court cited the provision in RLUIPA that defines "religious exercise" to "include any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc5(7)(A). Accordingly, in determining whether any of the Defendants' policies or actions imposed a substantial burden on Sisney's exercise of his religion, the Court will follow the Supreme Court's direction in *Cutter, supra,* and will not question whether the particular belief or practice Sisney seeks to express or do is central to the exercise of his religion. That does not mean that just any claimed belief or practice will go without examination.

Sisney contends several governmental policies and actions have imposed a substantial burden on his ability to exercise his religion, which will each be examined below to determine whether Sisney has met the threshold showing and, if so, the Court will determine whether there is any genuine issue of material fact remaining for trial on whether Defendants have met their burden of persuasion under RLUIPA. Defendants contend that Sisney's professed religious beliefs are not sincerely held, and the Court finds based upon all the evidence in this case that there is a genuine issue of material fact remaining for trial on the sincerity of Sisney's religious beliefs.

1. Succah or Sukkot Booth

One of Sisney's primary claims is that he has not been allowed to use a succah or Sukkot Booth during the feast of Sukkot. A succah is a booth in which individuals practicing Judaism eat their meals during the one-week feast of Sukkot. Sisney does not own a succah, but one was donated to the Jewish inmates at the SDSP by some inmates at the Mike Durfee State Prison in Springfield, South Dakota, a separate South Dakota Department of Corrections ("SDDOC") facility. The succah donated to the SDSP Jewish group has a metal frame, to which canvass is attached to make it a three sided booth. Only one person can fit in the booth at any one time.

In a Project Application filed on June 17, 2003, Sisney requested that the Jewish inmates be allowed to erect a succah outdoors in the SDSP's recreation yard and eat their meals in the succah. Alternatively, Sisney asked that the Jewish inmates eat their meals at the normal time and place but be given additional time at the end of the day to recite special prayers. Sisney states that he had already been told by Wagner that his request for a succah would be denied before he filed the Project Application, so he decided to include the alternate request to at least be given additional prayer time. (Sisney Affidavit, Doc. 247 ¶¶ 49, 64.)

Sisney produced affidavits from two inmates who were confined in the Mike Durfee State Prison, during September 2002, who observed an inmate, Phillip Heftel, erect a succah. (Sisney Affidavit, Doc. 247, Ex. E.) Heftel, also an inmate who practices Judaism, entered into a settlement agreement with the SDDOC and its employees in February 2000, regarding several aspects of Heftel's practice of the Jewish religion. Even if Sisney were found to be a third-party beneficiary of this agreement, use of a succah was not specifically discussed in the Settlement Agreement.

Sisney's request for use of a succah was denied by Defendant Block. But Sisney was granted additional time each evening to meet and recite special prayers during the feast of Sukkot. Sisney renewed his request to use a succah in his Project Application relating to High Holy Days for 2004. (Sisney Affidavit, Doc. 247, Ex. Y.) The Project Application requested a time to set up the Sukkot Booth and to consume the lunch meal in the succah for seven days. The request to erect a succah in the 2004 Projection Application was denied for the following reasons:

> SDSP Policy prohibits the inmate-to-inmate transfer of property. The Springfield inmates [at the Mike Durfee State Prison] may not give you a booth. We also

examined the booth from Springfield and determined that its placement in the prison yard creates numerous safety, security and staffing problems. Such problems include, but are not limited to, the following:

a. The booth constitutes a security threat because the poles could be used as weapons, or inmates in the booth are shielded from the view of officers that would conceal from view illicit and prohibited activities. Unlike the Native American Sweatlodge, the Sukkah is intended to be temporary and can easily be torn apart and does not protect against all forms of weather.
b. Staffing and logistics surrounding dining and recreation time makes it impossible to facilitate the request to eat meals in the yard;
c. Policy prevents inmates from possessing food or eating meals in the yard;

> d. the booth is not large enough to accommodate all of the Jewish inmates;

(Sisney Affidavit, Doc. 247, Ex. Y.) The response to the Project Application further states "[a]s an accommodation, the Jewish inmates are granted one half hour each day of Sukkot to recite the blessings over the four species every evening of Sukkot from 4:45 pm - 5:15 pm in the Phone Room." (*Id.*) Sisney renewed his request to use a succah in 2005 and 2006, but he has not been allowed to erect and use a succah. (*Id.*)

The evidence produced by Sisney satisfies his burden of showing, as a threshold matter, that the denial of a Sukkot Booth is a substantial burden on Sisney's ability to exercise his religion. Sisney has produced "prima facie evidence to support a claim alleging . . . a violation of [42 U.S.C. §] 2000cc" as to the denial of a Sukkot Booth in the years 2004, 2005 and 2006. 42 U.S.C. § 2000cc-2(b). Accordingly, the burden of persuasion, as well as the burden to establish the absence of any genuine issue of material fact, shifts to Defendants on the issue of whether denial of the Sukkot Booth was the least restrictive means to further a compelling governmental interest.

Defendants' suggestion that Sisney's Project Application "was essentially a request that the state provide [a Sukkah] to the inmates free of charge", Doc. 216 at p. 17, is a red herring. Sisney has not suggested that the SDDOC provide him a Sukkot Booth at no charge. Rather, Sisney seeks to utilize the Sukkot Booth that was donated to him and other inmates practicing the Jewish faith.

Defendants assert the denial of a Sukkot Booth was based on compelling concerns of institutional safety, order, and security. While the Court acknowledges the Defendants have a compelling interest in institutional security, "[n]evertheless, [they] must do more than merely assert a security concern." *Murphy*, 372 F.3d at 988. The Eighth Circuit explained, "[a]lthough we give prison officials 'wide latitude within which to make appropriate limitations, they must do more than offer conclusory statements and post hoc rationalizations for their conduct.'" *Id.* at 988-89 (quoting *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996)). In the rejection of Sisney's request to use the succah, Block compared the succah to the Native American sweatlodge. Sisney contends a Sukkot Booth poses significantly less security risk than the Native American sweatlodge that is maintained in the recreation yard and used by hundreds of Native American inmates. Although the poles from the succah could be

used as weapons if the canvass was removed from them, Sisney produced evidence that there are metal rakes, shovels and other tools in the sweatlodge that would provide a greater security risk because of their ease of accessibility to inmates. Moreover, the succah is used only seven days per year, but the sweatlodge is used by inmates year around.

Allowing inmates to transfer property to other inmates is a security concern raised by Defendants in relation to the Sukkot Booth, because the booth Sisney desires to use was donated by other inmates. To eliminate the risk of inmates transferring contraband, SDSP officials may thoroughly examine the donated succah to ensure no contraband is concealed in it before allowing Sisney access to the booth.

Another security concern asserted by Defendants is the inability to view the Jewish inmates at all times in the recreation yard. This reason is questionable given that inmates using the sweatlodge are fully concealed from SDSP officers with no correctional staff supervision in the sweatlodge. The succah has only three sides, allowing correctional staff to view the inmate sitting in the succah. In the denial of Sisney's request to use the donated succah, Block states it is "impossible" to facilitate the request to eat meals in the

yard during dining time. Sisney, however, did not request to eat meals in the recreation yard during dining time. Rather, he requested to eat meals in the succah during regular recreation time.

Based upon the existing record and the discussion above, the Court finds there is a genuine issue of material fact remaining for trial on the issue of whether denial of a succah or Sukkot Booth in 2003 through 2006 was the least restrictive means of furthering SDDOC's compelling governmental interests. Defendants Reisch, Weber, Block, and Wagner were involved in the denial of a succah to Sisney. Reisch was made personally aware of the denial of a succah by Sisney's letters to him. Warden Weber was involved in denial of a succah because in his capacity as Warden of the SDSP he denied Sisney's Request for Administrative Remedy to allow him to use a succah in the exercise of his religion. Block denied Sisney's Project Applications to use a succah. Wagner was involved in the process of determining whether to allow Sisney to use a succah and is the SDSP official charged with carrying out her superiors' denials of Sisney's use of a succah. Accordingly, summary judgment will be denied on the official capacity RLUIPA claims against Defendants Reisch, Weber, Block, and Wagner for denial of a Sukkot Booth to Sisney in 2003 to 2006.

2. Jewish Chapel and Additional Service Time

In July 2003, Sisney submitted a Project Application requesting that one specific room with access to the Jewish group's locker box be designated as the Jewish Chapel area, which would be the permanent place for the Jewish group to conduct their weekly services. (Wagner Affidavit, Doc. 219, Ex. I.) He also asked for access to a TV/VCR as needed for services. He contends that lack of a permanent place to conduct the Jewish group's weekly services substantially burdened the practice of his religion because he did not have access to required materials when needed during the services. Inmates are given five minutes prior to a service to obtain the items they need for the service and then they are not allowed access to the locker box after that time, until the last five minutes of the service to return items to the locker box. Having one designated room, wherein their locker box is stored, would allow the Jewish group access to the group's worship items during the services.

Defendants Block and Weber denied Sisney's request for designating one room for the Jewish group to conduct services and for their locker box to be in the same room. (Wagner Affidavit, Doc. 219 at Ex. 1.) The reason Defendant Block denied this request was that all of the SDSP's rooms are available

to all of the religious groups. (*Id.*) In his Administrative Remedy Response, Defendant Weber reiterated that all of the rooms are available to all inmate groups and that "[O]ther inmate groups that may use the room may tamper with your storage locker. At the present time, the storage locker is kept in a closet, in the phone room, whose door is constantly locked. You are asking for special treatment." (*Id.*) In their brief, Defendants maintain that Sisney was requesting an "exclusive" room for the Jewish Chapel and that this would have provided the Jewish group with "preferential treatment." (Doc. 216 at p. 21-22.)

The Court notes that Sisney did not request an exclusive room for the Jewish services. Rather, he requested that one room be designated for the place that all Jewish services would be held. He did not request exclusion of all other inmate religious groups from this same room. In any event, Sisney testified in his deposition that the Jewish group had sufficient space for their services and that the lack of a permanently designated room for Jewish services did not prevent him from practicing his religion. (Sisney Depo., Doc. 218, Ex. A at p. 353-54.) Moreover, to ensure they have all items needed for a particular service, the Jewish group can take all items from the locker box to the designated room for each service. The Court

does not find Sisney has met his threshold burden of showing the denial of a permanent space for Jewish services at the SDSP imposed a substantial burden on the exercise of his religion and Defendants are entitled to summary judgment on this claim.

Another request from Sisney was for additional time to conduct group Torah, Kabalistic and language studies. Sisney does have access to his personal religious books in his cell, but does not have access to the Jewish group's religious books maintained in their locker except during regularly scheduled services on Friday and Saturday evenings. The services on Friday are Shabbat services and on Saturday are Havdolah services and Torah readings. He maintains, however, that these group service times do not allow the Jewish group sufficient time to conduct group Torah, Kabalistic and language studies because the entire time on Friday and Saturday evenings are consumed by setting up for those two services, conducting the services and cleaning up after the services. He pointed out in his Project Application that the other religious groups have significantly more service times available, including 6 periods per week for Native Americans, 10 periods per week for Catholics and 8 times per week for Christians. (Wagner Affidavit, Doc. 219, Ex. M.) This request for additional group time was denied by Defendant Block on

July 31, 2003 by stating: "You have ample time during Shabbat Service to study Torah." (*Id.*) It was again denied by Warden Weber in an Administrative Remedy Response dated August 27, 2003. (*Id.*)

The Court finds Sisney has produced sufficient evidence to meet his threshold burden of showing denial of an additional period of time for group study of the Torah, Kabalistic and language studies imposed a substantial burden on the exercise of his religion. The burden then shifts to the Defendants on Sisney's RLUIPA claim.

Defendants have not identified a security interest that could be found to be a compelling governmental interest for refusing additional congregate time for Torah, Kabalistic and language studies. It appears the interest they are asserting is treating all religious inmate groups equally with no preferential treatment to anyone group. Defendants cite *Baranowski v. Hart*, 2005 WL 1667820, (S.D. Tex. Jul. 15, 2005), *aff'd* 486 F.3d 112 (5th Cir. 2007), in support of their claims that Sisney has failed to show denial of additional service time is a substantial burden on the exercise of his religion. The Court rejects the holding and rationale in *Baranowski*, however, as that court held the prison officials' refusal to provide a kosher diet to the plaintiff, an inmate practicing the

Jewish faith, did not violate the First Amendment or RLUIPA. *See id.* at *7. This is an untenable holding that has not been accepted by other district courts in the Eighth Circuit. *See Toler*, 2007 WL 2238661, at *3-4 (denying prison officials' motion for summary judgment on prisoner's claim that refusal to provide kosher diet violated RLUIPA); *El-Tabech*, 2007 WL 1487148 (D. Neb. 2007) (same). Defendants don't appear to contest that refusal to provide a kosher diet would violate RLUIPA. Accordingly, the Court is unpersuaded by the decision in *Baranowski, supra.*

It appears from the inmate religious gathering schedule that other religions are provided more service times than the Jewish inmates. (Doc. 247, Ex. FF.) Although the Defendants contend the reason for these additional time periods is that there are significantly more inmates observing the religions that are given more time periods for group services, it appears inmates are free to attend as many of the offered services as they desire with the exception of certain Native American gatherings and the Cornerstone Bible Study. (*Id.*) In addition to group service times, it likewise appears from the schedule that other inmates are given time for group religious text studies. (*Id.*) The Court does not find Defendants have produced evidence of a compelling governmental

interest for refusing to allow additional congregate time for Torah, Kabalistic and language studies. Even if there was a compelling governmental interest, the Court finds there are genuine issues of material fact regarding whether Defendants' refusal of an additional time period for Torah, Kabalistic and language studies is the least restrictive means of furthering any compelling governmental interest.

3. Rabbi

On July 28, 2003, Sisney submitted a Project Application requesting that the SDSP obtain the services of a Rabbi to assist the Jewish group because of "the lack of Rabbis in the Sioux Falls area." (Wagner Affidavit, Doc. 219, Ex. J.) He suggested the Benevolent Fund could be used to pay for the Rabbi visits once or twice per month.

Defendant Block denied this request stating: "The benevolent fund does not reimburse for Rabbis, chaplains, medicine men, etc.. If you need assistance in locating a Rabbi, contact the CAC Office." (Wagner Affidavit, Doc. 219, Ex. 1.) The "CAC Office" referred to by Defendant Block, is the Cultural Activities Coordinator, who is currently Defendant Wagner. Defendant Weber denied Sisney's request for Administrative Remedy on the same grounds the Project Application was denied by Defendant Block.

Defendants did not refuse to allow visits by a Rabbi. Moreover, there is evidence in the record that although her attempts failed, Defendant Wagner did attempt to find a Rabbi in Sioux Falls to assist the Jewish group. Even if the Benevolent Fund could be used to pay for visits by a Rabbi, Sisney has not produced any evidence that he could get a Rabbi to make such visits to the SDSP. Sisney has been able to conduct the Friday and Saturday services without consistent visits from a Rabbi. Although leadership of a Rabbi would presumptively assist Sisney in the exercise of his religion, Sisney has not produced sufficient evidence to show that Defendants' policy or actions imposed a substantial burden on the exercise of his religion. Accordingly, Defendants are entitled to summary judgment on this claim.

4. Visits by Rabbinical Students

Sisney alleges Defendants Wagner and Loen violated his rights by interfering with a visit in 2003 that he and Jewish group had with two students studying to become Rabbis. He contends Defendant Wagner prevented him from talking to the students about certain topics, including the use of a succah. He admits Loen did not speak during the meeting. Although Defendants question whether Sisney has asserted a violation of RLUIPA, the Court will construe Sisney's claim regarding the rabbinical student visit as

violating his rights under RLUIPA. Similar to the claim regarding visits by a Rabbi, however, Sisney has failed to produce sufficient evidence to meet his threshold burden of showing that Defendants Wagner and Loen's actions during the meeting with the rabbinical students in 2003 imposed a substantial burden on the exercise of his religion.

5. Religious Property

In another Project Application submitted on July 28, 2003, Sisney requested that he be allowed to possess or use the following property: 1) succah; 2) charity box; 3) a tape player in his cell to listen to Hebrew language tapes; 4) religious calendars; 5) additional herbs and oils; 6) a lightbulb diffuser to be used in his cell for essential oils; and 7) incense to be used in the chapel area. (Wagner Affidavit, Doc. 219, Ex. C.) All of these requests were denied by Defendant Block, and he noted that Sisney had access to a charity box in the chapel. (*Id.*) It was also noted that Sisney had access to a tape player in the chapel, but that it could not be used in individual cells. (*Id.*) In addition to the above property, Sisney requested that he be allowed view what he refers to as the "Jewish Curriculum", which was information regarding Judaism gathered and kept by the Cultural Activities Coordinator. He also requested that he be allowed to repair his tzit-tzit shirt, a fringed

shirt worn by persons practicing Judaism, rather than having to purchase a new tzit-tzit shirt. These additional requests were denied as well.

a. Succah. For the same reasons explained above relating to the succah or Sukkot Booth, summary judgment will be denied on this property claim.

b. Charity Box. Because Sisney had access to a charity box in the chapel, he has not met his burden to show Defendants' policy or actions imposed a substantial burden on the exercise of his religion and summary judgment will be granted on this claim.

c. Tape player. Sisney seeks the use of a tape player to allow him to study the Hebrew language. The Jewish group was denied additional congregate time in the chapel area for language studies and Sisney contends the current congregate time does not allow sufficient time for language studies in addition to conducting services. The Court found above that Sisney has met his threshold burden of establishing a substantial burden on the exercise of his religion for denying additional congregate time for Torah, Kabalistic and language studies and that Defendants did not meet their burden of proof on this RLUIPA claim. The request for the tape player for purposes of language studies

is related to the request for additional language study time. Defendants state that no inmates are allowed to possess tape players in their cells, but Defendants have offered no evidence regarding the reason for this policy. Moreover, that no inmates are allowed to possess tape players does not end the inquiry. RLUIPA specifically prohibits Defendants from imposing a substantial burden on the exercise of Sisney's religion "even if the burden results from a rule of general applicability" unless the Defendants meet their burden of proof under RLUIPA. 42 U.S.C. § 2000cc-1(a). At this point in the proceedings, the Court finds Sisney has produced sufficient evidence to meet his threshold burden of showing the denial of a tape player or sufficient time to use the tape player imposed a substantial burden on the exercise of his religion and Defendants have not met their burden of showing an absence of a genuine issue of material fact that denial of a tape player is the least restrictive means of furthering a compelling governmental interest.

d. Religious Calendar. Sisney has not produced sufficient evidence to establish that denial of a commercially-prepared Jewish religious calendar substantially burdened the exercise of his religion. He is allowed to make his own calendar and has not been denied access to materials from which he can

learn the dates of religious holidays. Defendants are entitled to summary judgment on this claim.

e. Herbs, Oils and Incense. Defendants contend Sisney's claim relating to denial of herbs and oils is time barred because it was first denied in 2000. This argument is unavailing, however, because Sisney again requested such herbs and oils in his Project Application, dated July 28, 2003, and the 2003 request is the basis for his claims in this action. Defendants contend Sisney admitted the requested herbs and oils were not "required to practice Judaism". (Doc. 216 at p. 33.) In Sisney's Answers to Interrogatories and Requests for Production, Sisney stated: "Plaintiff knows of no books which state oils and herbs are required to practice Judaism. Tradition and practice show that oils and herbs are used by custom in many Jewish observances." (Doc. 218, Ex. C at p. 5.) In his Affidavit, Sisney states "Judaism itself uses a variety of herbs and oils as specified in the Torah, Siddur and traditional ceremonies like Havdolah." (Sisney Affidavit, Doc. 247 at ¶ 82.) Other than Sisney's Affidavit, however, there is no evidence establishing how herbs and oils enhance Sisney's exercise of his Jewish faith. Sisney had failed to meet his threshold burden of establishing the denial of herbs and oils

imposes a substantial burden on the exercise of his religion.

In addition to requesting herbs and oils to practice Judaism, Sisney seeks herbs and oils to practice Kabalah, which he describes as "a religious belief system rich in ideas and tradition." (Sisney Affidavit, Doc. 247 at ¶ 82.) Sisney, however, has not produced sufficient evidence to carry his threshold burden of establishing that denial of herbs and oils to practice Kabalah imposes a substantial burden on the exercise of his religion.

Sisney also requested to burn incense in the chapel area. He has failed, however, to meet his threshold burden of establishing that inability to bum incense imposes a substantial burden on the exercise of his religion. Accordingly, Defendants are entitled to summary judgment on Sisney's RLUIPA claims regarding denial of incense and denial of herbs and oils in the 2003 Project Application.

f. Lightbulb Diffuser. Sisney requested that he be allowed to possess and use a lightbulb diffuser to use oils and burn herbs in his cell. Defendants denied this request because such diffusers pose a serious fire hazard, other inmates and staff may be allergic to the fumes they emit or find the

aroma offensive and they can be used to conceal prohibited activities such a smoking. The Court does find Defendants' proffered reasons for denial of the lightbulb diffuser appear to be the least restrictive means for furthering a compelling governmental interest. Also, in light of the dismissal of Sisney's claim regarding herbs and oils, Defendants are entitled to summary judgment on Sisney's RLUIPA claim for denial of a lightbulb diffuser because this action does not impose a substantial burden on the exercise of Sisney's religion.

g. Jewish Curriculum. Sisney's request to view information Defendant Wagner had in her possession regarding the practice of Judaism was initially granted by Defendant Weber. Wagner, however, imposed several conditions before Sisney would be allowed to view these materials. Sisney claims he complied with those conditions and Wagner denies Sisney complied with the conditions. This dispute of fact is immaterial, however, because there is no dispute that at some point during the pendency of this lawsuit Sisney was furnished a full and complete copy of the Jewish curriculum. Accordingly, this claim is moot and Defendants are entitled to summary judgment on this claim.

h. Tzit-tzit Shirt. Sisney requested that he be allowed to purchase string to

repair the frayed fringes on his tzit-tzit shirt rather than having to purchase a new one. Defendants Block and Slykhuis were the only SDSP officials involved in the denial of this request. The reason given for the denial is that "[s]tring is not an approved item for any group's religious property." (Slykhuis Affidavit, Doc. 221 at Ex. D.) The penological interest advanced by Defendants for this denial is a security interest because the string can be used as a weapon. The Court does not reach the issue of whether this is the least restrictive means for furthering a compelling governmental security interest, because Sisney has failed to meet his threshold burden of showing denial of the replacement string imposed a substantial burden on the exercise of his religion. Sisney has not been denied the ability to wear his tzit-tzit shirt and he has not produced any evidence to dispute Slykhuis' Affidavit that Sisney had sufficient funds to purchase a replacement tzit-tzit shirt if he so desired. Summary judgment will be granted to all Defendants on this claim.

F. Constitutionality of RLUIPA

Having concluded that Defendants are not entitled to summary judgment on all of Sisney's RLUIPA claims, Defendants' constitutional challenge to RLUIPA must be considered by the Court. Defendants contend Congress exceeded its powers under the Commerce Clause and the Spending Clause in

enacting RLUIPA. They also contend RLUIPA violates the separation of powers doctrine. Sisney and the United States, as intervenor, maintain that RLUIPA does not violate any constitutional provisions and, therefore, should be upheld as a valid act of Congress.

The Supreme Court held that RLUIPA does not violate the Establishment Clause. *See Cutter*, 544 U.S. at 719-21. Although the Supreme Court acknowledged issues concerning RLUIPA's constitutionality under the Spending and Commerce Clauses, it did not resolve these issues in *Cutter*. *See* 544 U.S. at 718 & n.7. The Eighth Circuit has not ruled on the constitutionality of RLUIPA under the Spending or Commerce Clauses. Numerous courts have upheld the constitutionality of RLUIPA under the First and Tenth Amendments, the Spending and Commerce Clauses and the separation of powers doctrine. *See Madison*, 474 F.3d at 124 (holding RLUIPA constitutional as a proper exercise of Congress' Spending Clause power); *Benning*, 391 F.3d at 1303 (rejecting constitutional challenges to RLUIPA based upon First and Tenth Amendments and finding Congress validly exercised its authority under the Spending Clause); *Charles*, 348 F.3d at 609 (rejecting constitutional challenges to RLUIPA based upon First and Tenth Amendments and the

Spending Clause); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), cert. denied, *Alameida v. Mayweathers*, 540 U.S. 815 (2003) (same and also rejecting constitutional challenge under separation of powers doctrine).

For the reasons set forth below, the Court concludes RLUIPA is a valid exercise of Congress' power under the Spending Clause, and, therefore, the Court need not address Defendants' other constitutional challenges. *See Benning*, 391 F.3d at 1304 (recognizing that courts need not resolve both a Spending Clause and Commerce Clause challenge to legislation "so long as Congress validly exercised either source of authority."); *Mayweathers*, 314 F.3d at 1068 & n.2; *Madison*, 474 F.3d at 126 & n.1; *Charles*, 348 F.3d at 609 ("Because we find that RLUIPA is valid under the Spending Clause, we need not involve ourselves in arguments concerning the Commerce Clause.").

The Constitution grants Congress the authority to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). The Supreme Court has,

however, "placed several restrictions upon Congress' authority to persuade" a State to conform to federal policy choices. *Madison*, 474 F.3d at 124. RLUIPA must meet several requirements to be a valid exercise of Congress' power under the Spending Clause:

> (1) the exercise of the spending power must be for the general welfare, (2) the conditions must be stated unambiguously, (3) the conditions must bear some relationship to the purpose of the federal spending, (4) the conditions must not violate some other constitutional command, and (5) the financial inducement offered by Congress must not be so coercive as to pass the point at which pressure turns into compulsion.

Madison, 474 F.3d at 124 (quotation marks and citations omitted). Defendants admit that South Dakota accepts federal funding for its prisons. *See* Bollinger Affidavit, Doc. 225 at Ex. B. Thus, RLUIPA applies to institutionalized persons in South Dakota. *See* 42 U.S.C. § 2000cc-1(b)(l).

The first requirement, that the exercise of the spending power must be for the general welfare, is satisfied in this case. The Supreme

Court recognized that, "[b]efore enacting § 3 [of RLUIPA], Congress documented, in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Cutter*, 544 U.S. at 716 (citations omitted). The Fourth Circuit found Congress' efforts to protect religious rights and promote rehabilitation were for the general welfare:

> Here, Congress sought to protect prisoners' religious liberty from unjustified and substantial burdens, *see Cutter*, 544 U.S. at 716-17, and we have no trouble concluding that RLUIPA's "attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare." *Charles*, 348 F.3d at 607.

Madison, 474 F.3d at 125. The Ninth Circuit also found RLUIPA promotes the general welfare. *See Mayweathers*, 314 F.3d at 1066-67. In reaching this conclusion, the Ninth Circuit recognized the First Amendment's protection of the free exercise of religion "demonstrates the great value placed on protecting religious worship from impermissible government intrusion." *Id.* In addition, the Ninth Circuit found that,

"RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms." *Id.* at 1067. The Court agrees with the Fourth, Seventh and Ninth Circuit's that RLUIPA promotes the general welfare. *See Madison*, 474 F.3d at 124-25; *Charles*, 348 F.3d at 607; *Mayweathers*, 314 F.3d at 1066-67.

RLUIPA satisfies the second requirement that the conditions on the receipt of federal funding must be stated unambiguously. It is clear that RLUIPA applies to "any case in which the substantial burden is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-l (b)(1). Moreover, the plain language of RLUIPA sets forth the conditions on which governments accept federal prison funds:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). States and their agencies and departments are explicitly included in the definition of "government" under RLUIPA. *See* 42 U.S.C. § 2000cc-5(4)(A). The Fourth, Eleventh, Seventh and Ninth Circuits found RLUIPA satisfies the second requirement for a valid exercise of Congress' Spending Clause authority, and the Court agrees. *See Madison*, 474 F.3d at 125; *Benning*, 391 F.3d at 1305-07; *Charles*, 348 F.3d at 607-08; *Mayweathers*, 314 F.3d at 1067.

The third Spending Clause requirement, that the conditions bear some relationship to the purpose of the federal spending, is easily satisfied in this case. "Both the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress, and those goals are related to the use of federal funds for state prisons." *Benning*, 391 F.3d at 1308; *see Madison*, 474 F.3d at 126; *Charles*, 348 F.3d at 608-09 ("Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that

infringes impermissibly upon individual liberties."); *Mayweathers*, 314 F.3d at 1067.

Pursuant to the fourth requirement, the conditions imposed by RLUIPA must not violate some other constitutional command. This requirement "stands for the 'unexceptional proposition' that the Spending Clause 'may not be used to induce the States to engage in activities that would themselves be unconstitutional.'" *Madison,* 474 F.3d at 127. The Court does not find that RLUIPA induces South Dakota to engage in any unconstitutional activities. Contrary to Defendants' position, South Dakota's compliance with RLUIPA does not violate the Establishment Clause, the Tenth Amendment, or the separation of powers doctrine. The Supreme Court held that RLUIPA does not violate the Establishment Clause. *Cutter*, 544 U.S. at 719-21. Moreover, "when Congress engages in a constitutional use of its delegated Article I powers, the Tenth Amendment does not reserve that power to the States." *Charles*, 348 F.3d at 609. Defendants advance the same separation of powers argument rejected in *Mayweathers*, 314 F.3d at 1070. As recognized by the Ninth Circuit, however, "RLUIPA provides additional protection for religious worship, respecting that [*Employment Division v. Smith*, 494 U.S. 872, 890 (1990)] set only a constitutional floor - not a ceiling - for the

protection of personal liberty. *Smith* explicitly left heightened legislative protection for religious worship to the political branches. *Smith*, 494 U.S. at 890, 110 S. Ct. 1595." *Mayweathers*, 314 F.3d at 1070. Like the Fourth Circuit, the Court concludes that, "[b]ecause RLUIPA does not induce the States to engage in unconstitutional activities, it does not impose an unconstitutional condition." *Id.*

The final requirement for legislation to satisfy the Spending Clause is that "the financial inducement offered by Congress must not be so coercive as to pass the point at which pressure turns into compulsion." *Madison*, 474 F.3d at 124. Defendants maintain that RLUIPA is clearly coercive because South Dakota would have to reject 100% of the federal prison funds if it chose not to be subject to the standard of review in RLUIPA. This argument was rejected by the Fourth Circuit in light of the small portion of the state's prison budget that was contributed by the federal government. *See Madison*, 474 F.3d at 128. In *Madison*, federal prison funds were 1.3% of the Virginia Department of Corrections' 2005 budget. *See id.* In the present case, Defendants assert the federal government has supplied 9.5% to 17.35% of SDDOC's annual budget over a six-year period of time. *See* Bollinger Affidavit, Doc. 225 at Ex. B. This averages approximately

14.4% of SDDOC's annual budget. Defendants contend, "Federal funds are essential to [SDDOC]'s ability to effectively manage its programs and services, and to provide for the safety and security of inmates and staff." Bollinger Affidavit, Doc. 225 at ¶ 11. The percentage of South Dakota's prison budget is higher than the percentages at issue in *Madison*, 474 F.3d at 124 (1.3%), *Charles*, 348 F.3d at 609 (1.6%), and *Mayweathers*, 314 F.3d at 1069 & n. 3 (less than 1%), and Defendants advocate that, "no court has ever held that the potential loss of 17% of a state's federal funding for corrections is acceptable under the Spending Clause." Doc. 274 at p. 13. Defendants, however, do not address the Eighth Circuit's decision in *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), in advocating this position.

In *Jim C.*, the Eighth Circuit rejected a Spending Clause argument in holding that Arkansas was not coerced into waiving its Eleventh Amendment immunity as to the Arkansas Department of Education by accepting federal funds amounting to 12% of the Department's budget. 235 F.3d at 1082. The federal legislation being challenged on Spending Clause grounds in *Jim C.* was Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Jim C.*, 235 F.3d at 1080. That RLUIPA is being challenged here does not alter the precedential value of *Jim C.*'s

coercion analysis under the Spending Clause. The total amount of annual federal funds the Arkansas Department of Education would have had to forego in making its decision at issue in *Jim C.* was $250 million, which is significantly more than the highest annual amount of $13,398,734 South Dakota would have had to forego to avoid application of RLUIPA. *See* Bollinger Affidavit, Doc. 225 at Ex. B. Similar to the 12% of Arkansas' annual education budget, the average percentage of approximately 14.4% of South Dakota's corrections' budget it would have to decline to avoid application of RLUIPA, "would be politically painful," but the Court cannot conclude that it compels South Dakota's choice. *Jim C.*, 235 F.3d at 1082.

Having examined all of the requirements, the Court concludes Congress has not exceeded its authority under the Spending Clause in enacting RLUIPA. And RLUIPA does not violate the Establishment Clause, the Tenth Amendment or the separation of powers doctrine. Accordingly, Defendants' summary judgment motion will be denied to the extent it challenges the constitutionality of RLUIPA.

G. First Amendment

Sisney asserts that, in addition to violating RLUIPA, all of the burdens imposed on the exercise of his religion discussed above

violate his rights under the Free Exercise Clause of the First Amendment. If Defendants are entitled to summary judgment on the merits under the more onerous strict scrutiny standard that applies to RLUIPA claims, they are also entitled to summary judgment under the more lenient standard that applies to First Amendment claims. Thus, on all claims Defendants were granted summary judgment under RLUIPA on the merits, they are likewise granted summary judgment on First Amendment grounds. As to the remaining claims, however, the Court will determine whether Defendants are entitled to summary judgment on First Amendment grounds because unlike under RLUIPA, Defendants can be held liable in their individual capacities under the First Amendment. In light of Sisney's failure to allege any physical injury caused by any alleged First Amendment violation, however, Sisney cannot recover more than nominal and punitive damages due to the limitations in the PLRA. *See* 42 U.S.C. § 1997e(e); *Royal*, 375 F.3d at 723 (holding that the PLRA's limit on damages for mental or emotional injury applies to First Amendment claims). As to Sisney's claim for punitive damages, however, the Court concludes that there is no basis for an award of punitive damages in this case and summary judgment will be granted on that prayer for relief. *See Royal*, 375 F.3d at 724 (holding that "[a] factfinder may assess

punitive damages in a section 1983 action when a 'defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'") (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).

The claims on which summary judgment was not granted to Defendants under RLUIPA are: (l) denial of a Sukkot Booth; (2) denial of additional time to conduct group Torah, Kabalistic and language studies; and (3) denial of use of a tape player for language studies in Sisney's cell. These claims will be evaluated under the First Amendment standard. As mentioned above in the discussion of individual and official capacity claims, the only claims remaining under 42 U.S.C. § 1983 are official capacity claims for injunctive relief and individual capacity claims for monetary damages. As to the individual capacity claims, the Court must also consider Defendants' qualified immunity defense.

Although prisoners do not lose all of their constitutional rights upon incarceration, "'[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration.'" *Hamilton v. Schriro*, 74

F.3d 1545, 1550 (8th Cir. 1996) (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). "An inmate who challenges the constitutionality of a prison regulation or policy that limits the practice of religion must first establish that it infringes upon a sincerely held religious belief." *Id.* In a footnote in their brief, Defendants's position on this issue is that the Court should "rule Sisney's demands were not motivated by sincerely-held religious beliefs." (Doc. 216 at p. 8.) Sisney has, however, produced sufficient evidence at this stage of the proceedings to establish that his religious beliefs are sincerely held and that Defendants' actions infringed upon those beliefs. Sisney contends he began learning about and studying Judaism before his incarceration and has been practicing the Jewish faith during his incarceration. Defendants do not dispute that Sisney regularly participates in the Friday and Saturday evening Jewish services at the SDSP and that he has requested to be placed on a kosher diet. They do, however, contend Sisney has eaten non-kosher foods from the commissary on a regular basis. This is an issue that must be resolved by a fact-finder, rather than on summary judgment.

Having made the threshold showings of sincerity and infringement, Sisney's First Amendment claims are evaluated under the

four-factor test established by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 81 (1987). *See Murphy*, 372 F.3d at 982-83. Under *Turner*, "[a] prison regulation or action is valid . . . even if it restricts a prisoner's constitutional rights if it is 'reasonably related to legitimate penological interests. '" *Id.* (quoting *Turner*, 482 U.S. at 89). The four factors to be evaluated are:

> First, we ask whether there is a "valid rational connection" between the prison regulation and the government interest justifying it. Second, we consider whether there is an alternative means available to the prison inmates to exercise the right. Third, we examine whether an accommodation would have a "significant 'ripple effect'" on the guards, other inmates, and prison resources. Fourth, we evaluate whether there is an alternative that fully accommodates the prisoner "at de minimis cost to valid penological interests."

Murphy, 372 F.3d at 982-83 (internal citations omitted).

1. Sukkot Booth

The Sukkot Booth was denied primarily for security reasons. Sisney seeks to use the Sukkot Booth in the open prison yard during recreation time. The Sukkot Booth is constructed with metal bars that could be used as weapons. The Court notes, however, that the metal bars would be secured together by the fabric used for the sides of the booth, making it more difficult to use them as weapons than if the metal bars were not secured to the booth. The booth would limit the guards' ability to observe an inmate sitting in the booth, but the booth has only three sides, allowing guards to view the inmate sitting in the booth from at least one side. Although the first factor is a close call, given these potential dangers posed by the Sukkot Booth, there is a valid rational connection between denial of the booth and the Defendants' security interest. If a booth is denied, there are no alternative means to exercise that aspect of his religious faith. Sisney did propose that the Jewish group be granted additional time to recite prayers during the feast of Sukkot if a succah would not be allowed, but he did that because Wagner had already informed him the request for a succah would be denied. Defendants granted this alternative request for additional prayer time during the feast of Sukkot. Nevertheless, additional prayer time is not an alternative means of eating meals in a succah.

Allowing the use of a Sukkot Booth could require SDSP prison guards to take a few more security precautions for a one week period of time each year, but it does not appear from the record it would impose a significant amount of additional work on guards or that it would require a significant allocation of prison resources to make this accommodation. As to the final *Turner* factor, allowing the use of a Sukkot Booth could be done at a de minimis cost to Defendants' interests as a succah was donated to the SDSP Jewish group and Sisney seeks to use it during regular recreation yard hours when guards are already required by prison regulations to supervise inmates in the yard.

Having examined all of the *Turner* factors, the only one that weighs in favor of the Defendants is the first factor. Based upon the existing record and the discussion above, the Court does not find Defendants are entitled to summary judgment on Sisney's First Amendment claim for denial of the use of a Sukkot Booth. Accordingly, the official capacity claim for injunctive relief will remain for trial. The Court must consider Defendants' qualified immunity defense on the individual capacity claims. Defendants Reisch, Weber, Block and Wagner were the only Defendants involved in the denial of the use of a Sukkot Booth.

The qualified immunity doctrine was explained by the Eighth Circuit in *Tlamka v. Serrell*, 244 F.3d 628, 632 (8th Cir. 2001):

> Qualified immunity protects a governmental official from suit when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." "What this means in practice is that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken."

Id. (citations omitted). The Court must conduct a two-part inquiry in deciding whether a prison official is entitled to qualified immunity: "whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, . . . whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert,* 526 U.S. 286, 290 (1999). When evaluating a qualified immunity defense at the summary judgment stage, the Court must

take as true those facts asserted by plaintiff that are properly supported in the record. *See Tlamka*, 244 F.3d at 632. If, however, there is a genuine dispute about the predicate facts material to the qualified immunity issue, the prison officials are not entitled to summary judgment. *See Pace v. City of Des Moines*, 201 F.3d 1050, 1056 (8th Cir. 2000).

The Supreme Court explained that, "[f]or a constitutional right to be clearly established, its contours, 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted)).

Sisney has not cited any case law that is similar enough to the denial of the use of a Sukkot Booth to find that a reasonable official would have understood such a denial violated Sisney's First Amendment rights to exercise his religion. Accordingly, the Court finds Defendants are entitled to summary judgment on the individual capacity claims for denial of the use of a Sukkot Booth.

2. Additional Time Period for Group Studies

Defendants denied additional time to conduct group Torah, Kabalistic and language studies because the group was allowed to meet on Friday and Saturday evenings each week and this amount of time was determined to be adequate by Defendants Wagner, Block and Weber. The Jewish group meets for 3 hours each week and is also permitted to meet for group worship on special religious holidays. Defendants argue this amount of time is ample time to conduct both group services and engage in group Torah and language studies. The only reason the Court could discern from the record in this case for denial of additional meeting time relates to allocation of "scarce administrative and correctional resources." (Wagner Affidavit, Doc. 219 at ¶ 91.) There may be a valid rational connection between denial of additional group activities and the allocation of prison resources, but the record in this case does not explain what that connection is. There are alternative means for Sisney to conduct Torah, Kabalistic and language studies because he may engage in individual study in his cell. Moreover, although Sisney may not have a dedicated time for group study, he does have an opportunity to discuss such issues with fellow inmates practicing the Jewish faith two times per week. Defendants did not produce any evidence to establish

what effect granting additional time for these studies would have on guards, other inmates and prison resources. The cost to fully accommodate Sisney's request are not explained on the current record. Based upon the current record, the Court cannot determine on summary judgment whether denial of additional time to conduct group Torah, Kabalistic and language studies is reasonably related to any legitimate penological interest. Only Defendants Wagner, Block and Weber were directly involved in the denial of Sisney's request for additional time, and thus all other Defendants are entitled to summary judgment in their individual and official capacities on this claim. For the reasons set forth above, Defendants Wagner, Block and Weber are not entitled to summary judgment on this claim in their official capacities.

As to the individual capacity claims, Defendants Wagner, Block and Weber assert the defense of qualified immunity on Sisney's First Amendment claims. None of the predicate facts material to the qualified immunity issue are in dispute on this claim. The Eighth Circuit has upheld restrictions on group inmate religious gatherings, *see Murphy*, 372 F.3d at 982-84, and at least one district court in the Eighth Circuit has upheld restrictions on the number of weekly group religious inmate gatherings, *see Harris v.*

Moore, 2007 WL 4380277, at *6-7 (E.D. Mo. Dec. 13, 2007). Sisney has not cited to any authority establishing he had a clearly established First Amendment right to meet with other inmates for more than three hours each week to engage in religious studies. In light of preexisting law, the Court does not find it would have been sufficiently clear to a reasonable prison official that denial of this additional time period would have violated Sisney's First Amendment rights. Accordingly, the Court finds Defendants Wagner, Block and Weber are entitled to qualified immunity on this claim in their individual capacities.

3. Tape Player

The final claim that will be evaluated on First Amendment grounds is the denial of a tape player for use in Sisney's individual cell for the purpose of language studies. Even though there may be such penological interests, Defendants do not offer any penological interest justifying the denial of a tape player for use in Sisney's individual cell. They simply state that no inmates are allowed tape players in their cells and that Sisney has access to a tape player during the three hours each week he meets with the Jewish group for group services. As to alternate means, Sisney has access to a tape player during the Friday and Saturday evening service times, during which he could possibly listen to the language

tapes. In addition, he can study the Hebrew language in his cell by using books and publications. Defendants have not produced any evidence to show what effect allowing Sisney to possess a tape player in his cell for study of the Hebrew language would have on guards, other inmates or the allocation of prison resources. There is also no evidence of whether there is an alternative that fully accommodates Sisney at de minimis cost to valid penological interests. Based upon the current record, the Court cannot determine on summary judgment whether denial of a tape player is reasonably related to any legitimate penological interest. Only Defendants Wagner, Block and Weber were directly involved in the denial of Sisney's request for a tape player, and thus all other Defendants are entitled to summary judgment in their individual and official capacities on this claim. For the reasons set forth above, Defendants Wagner, Block and Weber are not entitled to summary judgment on this claim in their official capacities.

Defendants cite several cases in which the courts held that denial of an audio or video tape player to an inmate for religious use was not unlawful. *See, e.g., Lindell v. Casperson*, 360 F. Supp. 2d 932, 953 (W.D. Wis. 2005); *Keesh v. Smith*, 2006 WL 516793, at *6-7 (N.D.N.Y. Mar. 2, 2006); *Wakefield v. Terhune*, 2000 WL 288392, at *5-6 (N.D. Cal.

Mar. 6, 2000). Sisney cites no authority establishing that it is unlawful to deny a tape player for inmate religious study. In light of preexisting law, the Court does not find it would have been apparent that denial of a tape player for use in his cell would have violated Sisney's First Amendment rights. Accordingly, the Court finds Defendants Wagner, Block and Weber are entitled to qualified immunity on this claim in their individual capacities.

In light of the above discussion, summary judgment will be granted on all of Sisney's First Amendment claims except for the following official capacity claims: (1) the claim against Defendants Reisch, Weber, Block and Wagner for denial of the use of a Sukkot Booth; (2) the claim against Defendants Weber, Block and Wagner for denial of additional time to conduct group Torah, Kabalistic and language studies; (3) the claim against Defendants Weber, Block and Wagner for denial of a tape player to study the Hebrew language. On these remaining claims Sisney might ultimately be entitled to receive injunctive relief but may not recover monetary damages because monetary damages are not recoverable on the official capacity claims under § 1983 and the Defendants are entitled to qualified immunity on the individual capacity First Amendment claims.

H. Equal Protection

To prevail on an equal protection claim, Sisney must establish that: "'(1) persons who are similarly situated are treated differently by the government, and (2) that the government has failed to provide a rational basis for the dissimilar treatment.'" *Hosna v. Groose*, 80 F.3d 298, 304 (8th Cir. 1996) (quoting *Moreland v. United States*, 968 F.2d 655, 660 (8th Cir. 1992)). In the context of an equal protection challenge, the Supreme Court held that prison officials may not deny an inmate "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam); *see Thomas v. Gunter*, 32 F.3d 1258, 1261 (8th Cir. 1994). The Eighth Circuit further recognized that, "unequal treatment of persons who are 'entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.'" *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007) (quoting *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) (citations omitted)).

1. Kosher Coffee

As to Sisney's equal protection claim for failure to provide kosher coffee, Sisney has not produced any evidence that there was an

element of intentional or purposeful discrimination involved in this denial. In Slykhuis's Affidavit, Doc. 221, he states he does not know whether kosher instant coffee exists or where to obtain such an item if it did exist. The Court notes, however, that Wagner sent an e-mail to Loen on April 14, 2005, informing Loen that "Folgers, Maxwell house and Nescafe all make kosher instant coffee." (Doc. 247, Ex. N.) But there is no evidence that Slykhuis was made aware of this information.

2. Sukkot Booth

Sisney also maintains that denial of a Sukkot Booth to the Jewish inmates, but allowing the Native American inmates to use a sweatlodge is a denial of equal protection. The Court finds there is sufficient evidence on the record to establish at this point in the proceedings that: (1) Sisney is similarly situated to Native American inmates and that he is treated differently by Defendants regarding the use of a Sukkot Booth compared to the use of a sweatlodge; and (2) that the Defendants have failed to provide a rationale basis for the dissimilar treatment. Nevertheless, the Court concludes Defendants are entitled to summary judgment on this equal protection claim because there is no evidence that there was an element of intentional or purposeful discrimination against Sisney for the unequal treatment.

3. Tzit-tzit String

An equal protection claim is advanced by Sisney regarding the denial of string to repair his tzit-tzit shirt. He contends Native American inmates are allowed string for their dance costumes and tobacco ties. Even if Sisney could establish he was treated differently and there was no rational basis for the dissimilar treatment, Sisney has failed to offer any evidence of intentional or purposeful discrimination based upon Sisney's religion for Defendants Block and Slykhuis' denial of the tzit-tzit string. Summary judgment will be entered in favor of all Defendants on this equal protection claim.

I. Access to the Courts

In explaining the actual injury requirement to show a violation of an inmate's right of access to the courts, the Supreme Court stated:

> The requirement that an inmate alleging a violation of *Bounds* [*v. Smith*, 430 U.S. 817 (1977)] must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. . . . It is for the courts to remedy past or imminent official

> interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.

Lewis v. Casey, 518 U.S. 343, 349 (1996). In *Lewis*, the Supreme Court explained that *Bounds v. Smith*, 430 U.S. 817 (1977) did not establish a right to a law library or legal assistance; rather, *Bounds* acknowledged the already well-established right of access to the court. *See Lewis*, 518 U.S. at 350. The Supreme Court further explained:

> Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. . . . Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone," [*Bounds*, 430 U.S.] at 823 (internal quotation marks

> omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Lewis, 518 U.S. at 351.

To the extent Sisney is claiming Defendant Slykhuis violated his right of access to the courts, there is no genuine issue of material fact that Sisney suffered any actual injury. Being denied the publication "The Jailhouse Lawyer's Handbook" did not cause any actual harm to Sisney's right to access the courts. He was able to file a comprehensive complaint and proceed with his

claims in the absence of this publication. Moreover, Sisney received a copy of this publication in 2007 and is now represented by counsel in this action. Accordingly, Slykhuis is entitled to summary judgment on Sisney's access to the courts claim.

The other access to the courts claim advanced by Sisney is that Defendant Loen denied copies of cases and statutes Sisney requested. Sisney requested copies of the codified versions of RLUIPA, *i.e.* 42 U.S.C. § 2000cc *et seq.*, but he possessed the Public Law version of RLUIPA. Sisney cited the relevant provisions of RLUIPA in nearly every one of his written communications with Defendants. Sisney demanded free copies of these statutes. DOC Policy 1.3.E.1 requires all inmates to pay fifteen cents per copy for cases and statutes. Sisney had adequate funds in his inmate trust account to purchase copies of the statutory version of RLUIPA, if he so desired. Even if Sisney did not have adequate funds to purchase copies of the statute, he had copies of RLUIPA and, thus, cannot show any actual injury for Loen's refusal to provide free copies to him. Loen is entitled to summary judgment on this claim.

J. Retaliation

"Conduct that retaliates against the exercise of a constitutionally protected right is actionable, even if the conduct would have

been proper if motivated by a different reason." *Cody v. Weber*, 256 F.3d 764, 771 (8th Cir. 2001). Moreover, "the retaliatory conduct does not itself need to be a constitutional violation in order to be actionable. 'The violation lies in the *intent* to impede access to the courts.'" *Id.* (quoting *Madewell v. Roberts*, 909 F.2d 1203, 1207 (8th Cir. 1990) (emphasis in original)). Filing inmate lawsuits and prison grievances are protected First Amendment activities. *See Lewis*, 486 F.3d at 1028.

Sisney claims Slykhuis retaliated against him for filing this lawsuit by not allowing Sisney to receive and possess The Jailhouse Lawyer's Handbook. On October 29, 2004, Sisney was notified by the SDSP mail room that a booklet from the Center for Constitutional Rights was rejected. After sending a kite to the mailroom he was advised the booklet was The Jailhouse Lawyer's Handbook. Sisney proceeded through the grievance process and he was informed that Slykhuis rejected this publication. Slykhuis contends the publication was rejected based upon prison rules rather than based upon an intent to retaliate against Sisney. Sisney, however, contends his receipt of this publication was not in violation of any prison rule and that several other inmates have received and continue to possess this publication. This contention is supported by

Sisney's later receipt of this publication. Slykhuis states he was not "aware of the *details* of the claims involved in this lawsuit." (Slykhuis Affidavit, Doc. 221 at p. 10 (emphasis added).) Sisney contends Slykhuis had knowledge of the filing of this lawsuit and although Slykhuis states he wasn't aware of the *details* of the lawsuit, he does not dispute that he knew this lawsuit had been filed by Sisney. The Court finds there is a genuine issue of material fact regarding whether Slykhuis' rejection of this publication was done with the intent to impede Sisney's access to the courts and, therefore, summary judgment will be denied on the retaliation claim against Slykhuis.

Sisney was allowed to add a retaliation claim against Wagner. (*See* Doc. 57 and 81.) This retaliation claim is alleged in paragraphs 110 and 131 in Sisney's Amended Complaint, Doc. 60. Defendants refer in general to retaliation claims against all Defendants in the discussion in their brief regarding the retaliation claim against Slykhuis and make a general argument in a footnote that all retaliation claims, including the claim against Wagner, fail on the merits because all Defendants are entitled to summary judgment on all of Sisney's claims. (Doc. 216 at p. 46,49 & n. 15.) Wagner acknowledged Sisney's retaliation claim in her Affidavit, Doc. 219, at ¶¶ 8 and 9, and denied that she retaliated

against him for filing this lawsuit. At least one paragraph in Sisney's Affidavit supports his claims of retaliation: "Wagner has engaged in a pattern of discrimination, derogatory treatment, and harassment from her first day as Cultural Activities Coordinator towards the Jewish Group and me. After initiating this litigation, treatment toward me has progressively gotten worse." (Sisney Affidavit, Doc. 247, at ¶ 46.) Sisney also alleged that Wagner interfered with his relationship with The Aleph Institute, which was providing information and materials to Sisney and other SDSP inmates practicing Judaism. The Aleph Institute was helping Sisney in his practice of Judaism until Wagner inquired why the Aleph Institute was assisting him when he was not born of a Jewish mother, had not gone through a proper conversion and did not study under a local Rabbi. (Wagner Affidavit, Ex. K.) Although neither Wagner nor Sisney focused on this claim, the Court finds there is evidence in the record to support Sisney's retaliation claim and the Court finds there is a genuine dispute of material fact on this claim. Accordingly, summary judgment will be denied on the retaliation claim in both Wagner's official and individual capacities.

As with all other § 1983 claims against the Defendants in their official capacities in this action, Sisney is limited to potential

injunctive relief against Defendants Slykhuis and Wagner on the above retaliation claims. The Court does not find either Defendant Slykhuis or Wagner are entitled to qualified immunity on Sisney's retaliation claims in their individual capacities. The law is clearly established that retaliation by prison officials is unlawful and there are genuine issues of material fact regarding their intent to retaliate against Sisney. The lack of any allegation of physical harm resulting from Slykhuis' or Wagner's alleged retaliation, however, will limit Sisney under the PLRA to the recovery of nominal and punitive damages in their individual capacities if he prevails. *See* 42 U.S.C. § 1997e(e); *Royal*, 375 F.3d at 723 (holding that the PLRA does not restrict a prisoner from recovering nominal and punitive damages, when otherwise warranted, for violations of constitutional rights). As with the other claims in this action, however, the Court does not find any basis for an award of punitive damages on the retaliation claims. *See Royal*, 375 F.3d at 724 (holding that "[a] factfinder may assess punitive damages in a section 1983 action when a 'defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'") (quoting *Wade*, 461 U.S. at 56). Thus, summary judgment will be granted to Defendants Slykhuis and

Wagner on Sisney's claim for punitive damages on the retaliation claims.

III. CONCLUSION

For the reasons set forth above, the Court holds as follows: (1) Defendants Reisch and Weber are not entitled to summary judgment on the grounds that they had no personal involvement in the actions challenged by Sisney in this lawsuit; (2) as to the claims under 42 U.S.C. § 1983, Defendants can only be held liable for injunctive relief on the official capacity claims, but can be held liable for monetary damages on the individual capacity claims, subject to their qualified immunity defenses; (3) Defendants are not subject to liability in their individual capacities under RLUIPA; (4) Defendants are subject to liability under RLUIPA in their official capacities for both injunctive and monetary relief, because the State's Eleventh Amendment immunity was waived in the Equalization Act, 42 U.S.C. § 2000d-7(a), and the text of RLUIPA allows the recovery of monetary damages, and Sisney is limited to the recovery of nominal damages under the PLRA because he failed to allege any physical injury and there is no basis for an award of punitive damages in this case; (5) Defendants are entitled to summary judgment on the merits of all of Sisney's RLUIPA claims except for the following: (a) denial of a succah or Sukkot Booth; (b) denial of

additional group time to engage in Torah, Kabalistic and language studies; and (c) denial of a tape player for language studies; (6) RLUIPA is constitutional as a valid exercise of Congress' power under the Spending Clause and RLUIPA does not violate the Establishment Clause, the Tenth Amendment or the separation of powers doctrine; (7) summary judgment will be granted to Defendants on all of Sisney's First Amendment claims except for his claim for injunctive relief against: (a) Defendants Reisch, Weber, Block and Wagner in their official capacities for denial of the use of a Sukkot Booth; and (b) Defendants Wagner, Block and Weber in their official capacities for denial of additional time to conduct group Torah, Kabalistic and language studies and for denial of a tape player to be used in Sisney's cell for religious language studies; (8) Defendants will be granted summary judgment on all of Sisney's Equal Protection claims; (9) summary judgment will be granted to Defendants on all of Sisney's access to the courts claims; and (10) the summary judgment motion will be denied as to Sisney's claims of retaliation against Defendants Slykhuis and Wagner and he will be limited to the potential recovery of injunctive relief on the official capacity claims and nominal damages on the individual capacity claims.

Pursuant to the rulings set forth above, Sisney is limited to the potential recovery of injunctive relief and nominal damages if he prevails on any of the claims in this action. "[O]ne dollar is recognized as an appropriate value for nominal damages." *Corpus*, 430 F.3d at 916. Given the $1.00 maximum monetary award Sisney could recover in this action, he cannot recover more than $1.50 in attorneys fees due to the restrictions in the PLRA. *See Royal*, 375 F.3d at 725. The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Given that the value in controversy in this action does not exceed twenty dollars, the parties are not entitled to a jury trial. *See Burt v. Abel*, 585 F.2d 613, 616 & n.7 (4th Cir. 1978) (holding that "[i]n an action for damages under § 1983, the seventh amendment requires a jury trial upon demand where the amount in controversy exceeds twenty dollars.") Accordingly, the remaining claims in this action will be submitted to the Court for adjudication. In addition to the limitations on monetary relief, injunctive relief in a prison conditions' lawsuit is governed by the PLRA, which provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). Accordingly,

IT IS ORDERED:

1. That Defendants' Motion to Strike, Doc. 272, is denied.

2. That Defendants' Motion for Summary Judgment, Doc. 214, is denied as to the following claims:

    a) Plaintiff's request for injunctive relief and claim for

nominal damages on his RLUIPA claim and his request for injunctive relief on his First Amendment claim against Defendants Reisch, Weber, Block and Wagner in their official capacities for denial of the use of a succah or Sukkot Booth;

b) Plaintiff's request for injunctive relief and nominal damages on his RLUIPA claim and his request for injunctive relief on his First Amendment claim against Defendants Wagner, Block and Weber in their official capacities for denial of additional time to conduct group Torah, Kabalistic and language studies;

c) Plaintiff's request for injunctive relief and nominal damages on his RLUIPA claim and request for injunctive relief on his First Amendment claim against Defendants Wagner, Block and Weber in their official capacities for denial of a tape player to be

used in Plaintiffs cell for religious language studies;

d) Plaintiff's retaliation claim under 42 U.S.C. § 1983 against Defendant Slykhuis for refusal to allow Plaintiff to receive The Jailhouse Lawyer's Handbook in 2004. If Plaintiff prevails on this claim, he will be limited to recovery of injunctive relief on the official capacity claim and will be limited to recovery of nominal damages on the individual capacity claim.

e) Plaintiff's retaliation claim under 42 U.S.C. § 1983 against Defendant Wagner. If Plaintiff prevails on this claim, he will be limited to recovery of injunctive relief on the official capacity claim and will be limited to recovery of nominal damages on the individual capacity claim.

3. That Defendants' Motion for Summary Judgment, Doc. 214, is granted as to all of Plaintiffs claims in this action except those

claims referred to in paragraph 2 above.

4. That Defendant Doug Loen is dismissed as a Defendant in this action.

5. That a Court trial will be held on the remaining claims in this action and a separate scheduling Order will be entered by the Court.

Dated this 6TH day of February, 2008.

BY THE COURT:

LAWRENCE L. PIERSOL

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK:
BY: JACKIE MESSENHEIMER
DEPUTY

No. 09-821

In The

Supreme Court of the United States

CHARLES E. SISNEY,

Petitioner,

v.

TIM REISCH, *ET AL.*
AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Brief of Respondents Tim Reisch, et al., in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

The Respondents restate the questions presented as follows:

1. Does the statutory reference to "appropriate relief" in the Religious Land Use and Institutionalized Persons Act of 2000 unambiguously extend to claims for money damages sufficient to waive state sovereign immunity?

2. Is RLUIPA a statute "prohibiting discrimination" as provided in the Civil Rights Remedies Equalization Act of 1986?

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ARGUMENT

Respondents do not dispute that a split exists in the Circuit Courts on the question whether the "appropriate relief" language in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc-1, waives state sovereign immunity against claims for money damages. In holding that it does not, the Eighth Circuit joined the Fourth, Fifth, Sixth and Seventh Circuits. *See Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006); *Sossamon v. Texas*, 560 F.3d 316 (5th Cir. 2009), *petition for cert. filed*, 77 USLW 3657 (May 22, 2009) (NO. 08-1438); *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009), *petition for cert. filed*, 78 USLW 3065 (Jul 22, 2009) (NO. 09-109); and *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009). One circuit, the Eleventh, has held that "appropriate relief" includes claims for money damages. *See Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007). While Respondents take no position whether this Court should grant certiorari to resolve the split, they argue: (1) the Eighth Circuit's decision is not contrary to any decision of this Court and was therefore correctly decided; (2) there is no circuit split on the issue whether Congress waived state sovereign immunity for RLUIPA claims through the Civil Rights Remedies Equalization Act ("CRREA"), 42 U.S.C. § 2000d-7; and (3) if the Court concludes that either the RLUIPA or CRREA issues warrant review, certiorari should be granted in this case rather than in *Cardinal* or *Sossamon* because the Eighth Circuit, unlike the Fifth and Sixth Circuits, not only decided both issues, but also decided the prior issue, whether Congress exceeded its spending power in enacting RLUIPA. Respondents have

sought review of that issue through their cross-petition. *See Reisch v. Sisney*, No. 09-953 (filed Feb. 9, 2010).

I. Although A Split Exists In The Circuit Courts, The Eighth Circuit's Decision Is Correct And Consistent With This Court's Decisions.

Petitioner Charles Sisney argues that the Eighth Circuit's decision is wrong because the decision "rejected" *Franklin v. Gwinnett County Pub. Schools*, 503 U.S 60 (1992), ignored *Barnes v. Gorman*, 536 U.S 181 (2002), and improperly imported *Lane v. Pena*, 518 U.S. 187 (1996), "to create a categorical rule that Congress cannot effectuate a waiver of monetary relief in Spending Clause legislation absent an express unequivocal reference to damages." Pet. at 27. Petitioner is mistaken.

First, there is nothing new, as Sisney argues, in "the Eighth Circuit's categorical rule requiring express waivers for damages." *Id.*, at 28. The Eighth Circuit not only cited the uncontroversial statement in *Lane* that a waiver of the federal government's sovereignty "must be unequivocally expressed in statutory text," 518 U.S., at 192, but also noted the difference between congressional abrogation of a state's sovereign immunity through legislation and a state's waiver of immunity through acceptance of federal funds conditioned on accepting liability. Pet. App. 23a. Sisney's suggestion that Congress need not unequivocally define the scope of the remedy to which a state may be subject when it accepts federal funds contradicts clearly-established law that "the mere receipt of federal funds cannot

establish that a State has consented to suit in federal court." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). The Eighth Circuit unavoidably considered whether in enacting RLUIPA Congress made sufficiently clear that a state accepting federal funds waived its immunity for money damages.

Second, Sisney's reliance on *Franklin*, in which this Court "presume[d] the availability of all appropriate remedies unless Congress has expressly indicated otherwise," 503 U.S., at 66, is misplaced. The Eighth Circuit noted that "*Franklin* did not involve a question of state sovereign immunity." Pet. App. 26a. Because the case did not involve governmental defendants, it cannot be used as authority for an independent waiver of sovereign immunity. "[W]hen it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties." *Lane*, 518 U.S., at 196. Thus, the Court held in *Lane* that "the Federal Government's sovereign immunity prohibits wholesale application of *Franklin* to actions against the Government to enforce § 504(a)" of the Rehabilitation Act. *Id.* The same is true of actions against a state on matters implicating its sovereignty.

Third, at issue in *Barnes* was whether punitive damages could be awarded in private suits brought under the Americans with Disabilities Act and the Rehabilitation Act. The Court characterized the issue as the scope of "appropriate relief" available under *Franklin's* presumption against local police officials. *Barnes*, 536 U.S., at 185. The Court considered whether punitive damages were

"appropriate relief" under Title VI of the Civil Rights Act of 1964, which itself mentioned no remedies, including even a private right of action. *Id.*, at 187. The case did not involve sovereign immunity, which no doubt explains why *Barnes* was not discussed by the Eighth Circuit in *Van Wyhe*, or by the Fifth or Sixth Circuits in *Sossamon* and *Cardinal*.

II. No Circuit Court Of Appeals Has Held That Congress Waived State Sovereign Immunity For RLUIPA Claims For Money Damages Through CRREA.

Although the Eleventh Circuit in *Smith* concluded that the phrase "appropriate relief" in RLUIPA encompasses monetary relief, thereby creating a circuit split on that issue, no circuit court of appeals has held, as did the district court in this case, that CRREA effects a waiver of state sovereign immunity for money-damage claims brought under RLUIPA. The only two circuits that have expressly considered the question have held that the Eleventh Amendment waiver expressed in CRREA does not extend to claims pleaded under RLUIPA because, contrary to Petitioner's assertion that RLUIPA "[b]y its terms" applies with equal force to discriminatory laws as well as laws of general applicability, Pet. at 5, 33, RLUIPA is not a statute "prohibiting discrimination." Pet. App. 28a-30a (absent an unequivocal textual statement that CRREA applies to Section 3 claims under RLUIPA, CRREA cannot be the basis for a knowing waiver of sovereign immunity); *Madison,* 474 F.3d, at 133 (because it is not clear that RLUIPA is a federal statute "prohibiting discrimination," ambiguity precludes

conclusion that Virginia knowingly consented to actions for damages by accepting federal funds). Sisney does not argue that this issue is, independently, of sufficient importance to warrant review by this Court. To the extent that it warrants review, however, certiorari should be granted in this case, in which the issue was actually decided, rather than in *Cardinal*, in which the issue was not addressed.

III. If Certiorari Is Granted, This Case Presents The Issues, Including The Constitutionality Of RLUIPA Pursuant To Congress's Spending Power, More Clearly Than The Decisions In *Sossamon* And *Cardinal*.

If the Court concludes that certiorari is warranted, this case is a more appropriate vehicle for the Court's consideration than either *Sossamon* or *Cardinal*.

First, Sisney frames three of the four questions that he presents for review as dependent on or relating to CRREA. Pet., at ii-iii. Similarly, the Solicitor General, who has recommended that certiorari be granted in *Cardinal v. Metrish*, No. 09-109, argues first in her invitation brief in that case that the Sixth Circuit did not even need to reach the question whether RLUIPA's authorization of "appropriate relief" is sufficiently clear to constitute a waiver of immunity to damage claims because Congress effected a waiver through CRREA. U.S. Br., *Cardinal*, at 8. As the Solicitor General herself acknowledges, however, the Sixth Circuit did not consider or decide that question. *Id.*, at 9 n.6. To

the extent that certiorari review requires consideration of CRREA as Sisney and the Solicitor General argue, this case alone directly presents the issue for review.

Second, the Solicitor General recommends that certiorari be granted in *Cardinal* and not *Sossamon* in part because the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(e), can pose an independent bar to recovery of money damages for inmates who do not allege a physical injury. U.S. Brief, *Sossamon*, at 8-9. The district court in this case concluded that Sisney's recovery would be limited to nominal damages under the PLRA for the same reason. *Sisney v. Reisch*, 533 F.Supp.2d 952, 973-74 (D.S.D. 2008). That consideration, however, is wholly secondary to and independent of the waiver issues under RLUIPA. Whether the language of RLUIPA affects a waiver of immunity sufficient to allow a claim for money damages is antecedent to whether the inmate's recovery would be limited by the PLRA, and resolution of the questions presented in this case would not depend on the amount of Sisney's potential recovery.

Finally, as the Eighth Circuit's decision makes clear by having considered the issue first, if RLUIPA is unconstitutional because it exceeded Congress's power under the Spending Clause, then whether RLUIPA authorizes claims for money damages against state officials is a moot question. The pending cross-petition offers the Court the occasion to resolve the issue left open, but noted, in *Cutter v. Wilkinson*, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring) ("RLUIPA . . . may well exceed Congress' authority under either the Spending Clause or the

Commerce Clause"). RLUIPA's constitutionality under the Spending Clause is not only squarely presented by the cross-petition filed in No. 09-953, but the issue should be decided in connection with the immunity issues presented here given that Sisney and the Solicitor General rely heavily on cases based on Congress' power "to impose conditions on states when it legislates pursuant to the Spending Clause." Pet. at 29.

CONCLUSION

The Eighth Circuit correctly concluded that neither the reference to "appropriate relief" in RLUIPA nor the waiver found in CRREA is sufficient to constitute a waiver of immunity here. If the Court concludes, however, that certiorari is appropriate, then the Court should grant certiorari in this case and address as well the scope of Congress' Spending Clause power.

Respectfully submitted,

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No. 09-821

In the Supreme Court of the United States

CHARLES E. SISNEY, PETITIONER

v.

TIM REISCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*

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In the Supreme Court of the United States

No. 09-821

CHARLES E. SISNEY, PETITIONER

v.

TIM REISCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 581 F.3d 639. The opinion of the district court (Pet. App. 41a-142a) is reported at 533 F. Supp. 2d 952.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2009. On December 1, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 8, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42

U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. The statute applies to two specific contexts, land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, which provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). Congress further defined the terms used in this provision. It defined "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). And Congress defined "government" as "a State, county, municipality, or other governmental entity created under the authority of a State"; "any branch, department, agency, instrumentality, or official of [such] an entity"; and "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A).

Before enacting RLUIPA, Congress held nine hearings over three years, during which it gathered substantial evidence that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities had faced substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999) (*House Report*); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698-16,699

(2000). Such "frivolous or arbitrary barriers" to religious exercise, *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. at 16,699), affected persons confined to correctional facilities in particular. See *House Report* 9-10; 146 Cong. Rec. at 16,701. Congress heard testimony about sectarian discrimination in the accommodations afforded to prisoners, see *Protecting Religious Freedom After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. III, at 41 (1998) (statement of Isaac M. Jaroslawicz), as well as instances of prison officials' interfering with religious rituals without apparent justification, 146 Cong. Rec. at 16,699, 16,701.

Based on the evidence it collected, Congress concluded that prison inmates faced "frivolous or arbitrary" rules that resulted from "indifference, ignorance, bigotry, or lack of resources" and that had the effect of restricting their religious exercise "in egregious and unnecessary ways." 146 Cong. Rec. at 16,699. To prevent federal funds from contributing to such unreasoned or discriminatory burdens on the religious exercise of institutionalized persons, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 1, to apply RLUIPA's statutory protections whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1).[1] A covered "program or activ-

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[1] In a provision not at issue in this case, Congress also invoked its authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, in providing that RLUIPA's protections apply to institutionalized persons when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2).

ity" includes "all of the operations of" "a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6), 2000d-4a(1)(A).

To ensure that persons entitled to RLUIPA's protection may vindicate their rights, Congress created a private right of action, permitting any individual whose religious exercise has been substantially burdened in a manner prohibited by the statute to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to "obtain appropriate relief against a government." 42 U.S.C. 2000cc-2(a). In addition, the United States may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Petitioner has been serving a life sentence for first-degree murder at the South Dakota State Penitentiary (SDSP) since April 11, 1997. Pet. App. 43a. Petitioner, who adheres to the Jewish faith, alleges that various prison officials violated his rights under the Constitution and RLUIPA by refusing to: (1) allow him to use a succah or Sukkot Booth during the Festival of Sukkot; (2) establish a permanent Jewish place of worship; (3) grant additional service time for group Torah, Kabalistic, and language studies; (4) use the Benevolence Fund to assist a group of Jewish inmates at SDSP in their efforts to secure a visit from a Rabbi; (5) refrain from interfering with a visit by rabbinical students; (6) allow petitioner to possess certain personal property for use in the exercise of his religion; and (7) grant petitioner's request to review what he refers to as the "Jew-

ish curriculum" maintained by the Cultural Activities Coordinator. *Id.* at 46a; see *id.* at 4a-6a.[2]

Petitioner filed this action against various prison officials in their official and individual capacities, alleging violations of RLUIPA and 42 U.S.C. 1983. Pet. App. 4a. Respondents sought summary judgment, arguing, *inter alia*, that they were entitled to qualified immunity and Eleventh Amendment immunity, and that RLUIPA is unconstitutional. *Id.* at 42a-43a, 51a-58a. The district court granted summary judgment to respondents on petitioner's Section 1983 claims on the basis of qualified and Eleventh Amendment immunity. *Id.* at 51a-54a, 118a-125a. The court also granted summary judgment to respondents on petitioner's RLUIPA claims against them in their individual capacities. *Id.* at 58a-61a. The court reasoned that Congress may not use legislation enacted pursuant to the Spending Clause—such as RLUIPA—to subject an individual who is not a recipient of federal funds to private liability for money damages for actions taken in his individual capacity. *Ibid.*

The district court went on to conclude that RLUIPA authorizes damages suits against officials in their official capacities. Pet. App. 62a-75a. The court reasoned that, although RLUIPA's explicit authorization of "appropriate relief" is not sufficiently clear to put a State on notice that, by accepting federal funds for its correctional system, it agrees to waive its immunity to such claims, *id.* at 62a-70a, such clear notice is present in 42 U.S.C. 2000d-7, which provides that "[a] State shall not be immune under the Eleventh Amendment * * * from suit

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[2] Petitioner also filed: property-related claims with respect to a number of items; retaliation claims against certain of the respondents; Equal Protection claims; and a claim of denial of access to the courts. See Pet. App. 46a.

in Federal court for a violation of * * * any * * * Federal statute prohibiting discrimination by recipients of Federal financial assistance," Pet. App. 70a-71a. The district court held that, because RLUIPA is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," *id.* at 72a (quoting 42 U.S.C. 2000d-7), the State of South Dakota waived its Eleventh Amendment immunity to RLUIPA suits for money damages against state officials in their official capacities when it accepted federal funds, *id.* at 70a-72a. The court noted, however, that any monetary relief could be limited to nominal damages as required by the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(e). Pet. App. 76a-78a. The district court also upheld the constitutionality of RLUIPA, rejecting respondents' contention that Congress exceeded its authority under the Spending Clause[3] in enacting the statute and that the statute violates the Tenth Amendment and the separation of powers doctrine. *Id.* at 102a-112a.[4]

In addition, the district court granted summary judgment in favor of respondents with respect to all of petitioners' claims except his RLUIPA and First Amendment official-capacity claims for injunctive relief concerning: (1) access to a Succah or Sukkot Booth; (2) additional time to conduct group Torah, Kabalistic, and language studies; and (3) access to a tape player in petitioner's cell. Pet. App. 82a-102a, 112a-136a.

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[3] Because the court held that RLUIPA's institutionalized persons provision is a valid exercise of Congress's Spending Clause power, the court did not address whether that provision is also a valid exercise of Congress's power under the Commerce Clause. Pet. App. 104a.

[4] The United States intervened in the district court pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of RLUIPA.

3. Petitioner filed an interlocutory appeal, which the court of appeals consolidated for purposes of appeal with another case presenting similar issues, *Van Wyhe* v. *Reisch*, No. 08-1409 (8th Cir.).[5] Pet. App. 3a. The court of appeals first upheld the district court's conclusion that Congress validly enacted RLUIPA's institutionalized persons provisions pursuant to its authority under the Spending Clause. *Id.* at 14a-23a.[6] The court of appeals disagreed with the district court, however, about whether RLUIPA validly authorizes private suits for money damages against States and state officials in their official capacities. The court held that such actions are not permitted because neither RLUIPA nor 42 U.S.C. 2000d-7 puts States on clear notice that accepting federal funds constitutes a waiver of Eleventh Amendment immunity to claims for damages. Pet. App. 23a-30a. The court of appeals further held that the district court erred in refusing to dismiss petitioner's official-capacity claims for injunctive relief regarding extra group study time, *id.* at 34a-36a, and access to a tape player, *id.* at 36a-37a, but affirmed the district court's denial of summary judgment for the claims related to petitioner's request for access to a Succah, *id.* at

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[5] The court of appeals concluded that it had appellate jurisdiction over those interlocutory appeals from orders denying a State's sovereign immunity from suit. Pet. App. 11a; see generally *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-147 (1993).

[6] Because the court of appeals upheld the statute as a valid exercise of Congress's Spending Clause authority, the court declined to address whether it is also a valid exercise of Congress's Commerce Clause authority. Pet. App. 23a. The court of appeals also did not address whether RLUIPA authorizes a claim for damages against state officials in their individual capacities because that issue was not presented in the appeal. *Id.* at 30a-31a n.6.

33a-34a, and with respect to his retaliation claims, *id.* at 38a-39a.

DISCUSSION

Petitioner asks this Court to decide whether an individual may sue a State or a state official in his official capacity for damages for a violation of RLUIPA, 42 U.S.C. 2000cc *et seq.* The same question is presented in *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009). At this Court's invitation, the United States filed a brief as amicus curiae in *Cardinal* on March 18, 2010, recommending that the Court grant the petition in *Cardinal* to decide that question. This Court should hold the petition for a writ of certiorari in this case pending its resolution of the petition in *Cardinal*, and then dispose of it accordingly.[7]

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[7] In addition, as noted in the United States' amicus brief in *Cardinal* (at 21-22), the PLRA, 42 U.S.C. 1997e(e), often poses an independent bar to recovery of money damages by state inmates under RLUIPA because the PLRA prevents an inmate from recovering more than nominal damages for a mental or emotional injury unless he can demonstrate a physical injury as well. 42 U.S.C. 1997e(e), 2000cc-2(e). Petitioner in this case does not appear to allege that he sustained a physical injury resulting from the RLUIPA violations he asserts. He therefore would not be entitled to compensatory damages in any event unless imposing a substantial burden on an individual's religious exercise in violation of RLUIPA constitutes something other than a mental or emotional injury. In *Cardinal*, by contrast, the petitioner alleges that he suffered a physical injury as a result of the alleged RLUIPA violation. For this reason, the Court may find that the petitioner in *Cardinal* is entitled to sue for compensatory damages under RLUIPA without resolving the ancillary and difficult question about whether imposing a burden on religious exercise counts as a mental or emotional injury under the PLRA.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009), and then should be disposed of accordingly.

Respectfully submitted.

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No. 09-821

In The Supreme Court of the United States

CHARLES E. SISNEY, *Petitioner,*

v.

TIM REISCH, ET AL., *Respondents,*

AND

UNITED STATES OF AMERICA, *Intervener.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER TO THE BRIEF OF THE UNITED STATES

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REPLY BRIEF FOR THE PETITIONER

I. Procedural Background

The petitions in *Sossamon v. Texas*, No. 08-1438, *Cardinal v. Metrish*, No. 09-109 and *Sisney v. Reisch*, No. 09-821 each raise the question whether the Eleventh Amendment bars private suits for money damages by prisoners against state officials for violations of Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5. The petition in *Sisney v. Reisch* raises the additional question whether the express prohibition against discrimination by federal funding recipients in the Civil Rights Remedies Equalization Act of 1986 ("CRREA"), 42 U.S.C. § 2000d-7, effectuates a waiver, either alone or in combination with RLUIPA, of the States' Eleventh Amendment immunity. Pet. at i-ii, 32-39; Pet. App. 23a-30a, 70a-76a.

On November 2, 2009, the Solicitor General was invited to file invitation briefs expressing the views of the United States on the questions presented in *Sossamon* and *Cardinal*.

On January 8, 2010, the petition in *Sisney* was filed. The Solicitor General sought and obtained two extensions of time until April 12, 2010, to file a response on behalf of the United States.[1]

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[1] The United States intervened in the proceedings before the district court and the court of appeals to defend the constitutionality of RLUIPA, and it is a party in intervention in this Court.

On March 18, 2010, the Solicitor General filed her invitation briefs recommending that the petition for a writ of certiorari should be granted in *Cardinal*, and that *Sossamon* should be held pending disposition of *Cardinal*. *Amicus Curiae* Brief for the United States in *Cardinal v. Metrish* at 6. The Solicitor General recommended that certiorari is warranted to resolve the split among the circuit courts on the question whether RLUIPA contemplates private suits for money damages and, if so, whether such suits are barred by the Eleventh Amendment. *Id.* at 14-21. The Solicitor General also recommended that certiorari is warranted on the basis that CRREA independently effectuates an express waiver of Eleventh Amendment immunity by recipients of federal funds. *Id.* at 8-13.

On April 12, 2010, the Solicitor General filed her response in the instant case recommending that the petition in *Sisney* should be held pending this Court's resolution of the petition in *Cardinal*.

II. This Case Presents An Appropriate Vehicle For Certiorari And Warrants Independent Review.

The Solicitor General agrees that certiorari is warranted to determine whether an individual may sue a State or a state official in his or her official capacity for damages for a violation of RLUIPA. The Solicitor General recommends that certiorari is warranted not only to resolve the circuit split addressing whether RLUIPA itself effectuates a waiver of Eleventh Amendment immunity, but also to allow this Court to consider whether CRREA's express prohibition against discrimination by federal funding recipients

effectuates an independent statutory waiver of Eleventh Amendment immunity. *Amicus Curiae* Brief for the United States in *Cardinal* at 7-13. Indeed, the lead argument advanced by the Solicitor General in support of certiorari is that this Court need not even reach the question whether RLUIPA's private right of action authorizing "appropriate relief" is sufficiently clear to effectuate a knowing and voluntary waiver of immunity from suits for monetary damages because Congress effectuated a waiver of immunity from such suits through CRREA.

The Solicitor General has thus recommended that certiorari should be granted in *Cardinal* on the same grounds raised and argued by Petitioner in this case. The *Sisney* petition unambiguously raises the question whether CRREA effectuates a waiver of Eleventh Amendment immunity, as well as whether CRREA's waiver extends to Section 3 of RLUIPA or, instead, is limited to federal statutes that expressly prohibit "discrimination" on the basis of discriminatory intent. *Sisney* Pet. at i-ii, 32-39. These questions were squarely presented to and expressly decided by the district court and the Eighth Circuit Court of Appeals in comprehensive published opinions.[2] Pet. App. 23a-30a, 70a-76a. As in *Cardinal*, Petitioner here also seeks a writ of certiorari to resolve the split among the circuit courts of appeals on whether RLUIPA itself expressly waives Eleventh Amendment immunity. Pet. at 21-32.

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[2] The Eighth Circuit's opinion is reported at *Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009).

As the Solicitor General acknowledges, the question whether CRREA, either independently or in conjunction with RLUIPA, is sufficiently clear to effectuate a knowing waiver of the States' Eleventh Amendment immunity from suit was never presented to or decided by the Sixth Circuit in *Cardinal*. *Id.* at 9-11, 11 n.6. Thus, in the event this Court finds that CRREA was not raised or preserved in *Cardinal*, the instant petition is an appropriate vehicle for this Court's consideration of that important question. Even if review is granted in *Cardinal*, an independent grant of certiorari is warranted in this case where CRREA was squarely briefed and decided below, and expressly presented by Petitioner to this Court for review.

The instant petition further asserts as a separate and distinct question presented whether this Court's precedents governing an express statutory waiver of the Federal Government's sovereign immunity apply with equal force to determine whether a state has knowingly waived its Eleventh Amendment immunity in the Spending Clause context. Pet. at ii, 22-23, 26-28, 32 n.9; Reply Brief for the Petitioner to the Brief of Respondents Tim Reisch. Petitioner has argued that notwithstanding the split among the circuits, the courts of appeals have critically erred in failing to recognize and enforce the analytic distinction between express statutory waivers of the Federal Government's sovereign immunity and voluntary waivers of Eleventh Amendment immunity through the States' acceptance of clearly conditioned federal funds.

The Solicitor General also relied on these grounds to assert error, and to recommend that the petition for

a writ of certiorari be granted in *Cardinal*. *Amicus Curiae* Brief at 18-19. On this issue, too, the instant case provides an appropriate vehicle for review, as this distinct issue was squarely presented by Petitioner for this Court's consideration as an independent question.

Nor does the record in this case involve the infirmities the Solicitor General notes in *Cardinal*. *Id.* at 6 n.4. The record in this case is well-developed and supported, with both the district court and the Eighth Circuit providing comprehensive published opinions analyzing in detail waiver under both RLUIPA and CRREA, and the current circuit court split. Pet. App. 23a-30a, 62a-76a. The merits of Petitioner's RLUIPA claims are established, as he adduced facts demonstrating substantial burden sufficient to withstand summary judgment. Pet. App. 34a.

While the circuit split is grounds for review, a grant of certiorari is additionally warranted to review the Eighth Circuit's erroneous adoption of the federal sovereign immunity standard to require an explicit textual reference to damages in the Eleventh Amendment context, and to consider waiver in light of CRREA. Since the instant petition was filed, the Ninth Circuit has expressly adopted the Eighth Circuit's construction of both RLUIPA and CRREA. *See Holley v. California Dep't of Corr.*, 599 F.3d 1108 (9th Cir. 2010). The Ninth Circuit followed the Eighth Circuit's holding that absent an unequivocal waiver of immunity in the statutory text that expressly extends to monetary damages, RLUIPA's "appropriate relief" language does not unambiguously extend to immunity from monetary claims. The Ninth Circuit expressly

rejected the contention that waivers of federal sovereign immunity should be treated differently than Eleventh Amendment waivers effectuated pursuant to the Spending Clause, and, in support, invoked the Eighth Circuit's reliance on this Court's federal sovereign immunity cases in analyzing waiver under RLUIPA. *Id.* at 1111-12 n.3.

The Ninth Circuit further adopted in its entirety the Eighth Circuit's analysis of waiver under CRREA, holding, as the court of appeals in this case did, that absent an express statutory reference to the term "discrimination" in Section 3, RLUIPA is not a statute that unambiguously prohibits discrimination within the meaning of CRREA and thus is insufficient to effectuate a waiver of immunity. *Id.* at 1113-14. The Eighth Circuit's erroneous construction and application of this Court's precedents, Eleventh Amendment immunity and CRREA has become entrenched and, absent correction by this Court, will likely be extended to foreclose relief for violations of other civil rights statutes enacted pursuant to the Spending Clause.

Finally, the Solicitor General suggests that review is more appropriate in *Cardinal* because Petitioner in this case does not appear to allege personal injury. Thus, the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e) would pose an independent bar to recovery of monetary damages unless the imposition of a substantial burden under RLUIPA constitutes a compensable mental or emotional injury under the PLRA. Brief of the United States at 8 n.7. The Solicitor General suggests that in order to avoid this "ancillary and difficult question" *Cardinal* is the

preferred vehicle. *Id.* However, the question of whether Petitioner suffered a "mental or emotional injury under the PLRA" is not at issue in this case. The district court noted the limitations imposed by the PLRA. Pet. App. 76a-78a. Petitioner did not challenge, and the Eighth Circuit did not address or resolve, whether the PLRA limits Petitioner's relief under RLUIPA to nominal damages. There is no difficult or ancillary question standing in the way of review here because the PLRA is not at issue.

Even so, whether Petitioner's recovery would be limited by the PLRA is wholly irrelevant to the questions presented, and does not in any way undermine the strength of the instant petition. Whether the language of RLUIPA, or RLUIPA and CRREA, is sufficient to manifest Congress' clear intent to condition the voluntary acceptance of federal funds on the States' waiver of immunity from suit is a question separate and distinct from any limitations on recovery the PLRA may impose. The Solicitor General's views notwithstanding, the PLRA does not undermine the strength of the petition in this case.

CONCLUSION

For the reasons above, Petitioner respectfully submits that the instant case is an appropriate vehicle, if not the preferred vehicle, for this Court to consider the question of waiver of Eleventh Amendment immunity under RLUIPA and CRREA, and that an independent grant of certiorari is warranted. Accordingly, this Court should not hold the instant petition pending *Cardinal*, but should grant the petition for a writ of certiorari.

Dated: May 3, 2010

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No. 09-821

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MAY 3 - 2010

In The
Supreme Court of the United States

CHARLES E. SISNEY, *Petitioner,*
v.
TIM REISCH, ET AL., *Respondents,*
AND
UNITED STATES OF AMERICA, *Intervener.*

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER TO THE BRIEF OF RESPONDENTS TIM REISCH ET AL.

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REPLY BRIEF FOR THE PETITIONER

I. The Eighth Circuit's Construction Of The Scope Of Eleventh Amendment Waivers In Spending Clause Legislation Is Fundamentally Wrong.

Respondents contend that there is nothing controversial about the Eighth Circuit's holding that Congress must unequivocally and expressly reference damages in statutory text before a state which voluntarily accepts federal funds and consents to suit for violations of Spending Clause legislation will be found to have consented to a waiver of its Eleventh Amendment immunity from monetary relief. They argue that the importation of the standards governing the Federal Government's sovereign immunity and consent to suit into the Eleventh Amendment and Spending Clause contexts is wholly unobjectionable.

But the question whether Congress has expressly and unequivocally consented to waive the Federal Government's sovereign immunity from suit is entirely distinct from the question whether a state has knowingly and voluntarily consented to a spending condition on the receipt of federal funds. And the question whether a state has knowingly and voluntarily consented to private suits in federal court is entirely distinct from the question of the scope of remedies available for a breach of Spending Clause conditions.

The United States as a sovereign is categorically immune from suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The only exception to the Federal Government's immunity is consent, the express terms of which are necessary to waive immunity and define

the scope of jurisdiction over the United States. *See id.* (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). When Congress waives the sovereign immunity of the United States, it must do so expressly and unequivocally in the statutory text. *Id.* ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Thus, "[w]aivers of immunity must be 'construed strictly in favor of the sovereign,' and not 'enlarge[d] . . . beyond what the language requires.'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (citations omitted).

Even when Congress waives the United States' sovereign immunity from suit, the terms of plaintiff's substantive rights and the scope of judicial remedies require the Federal Government's consent: "Like a waiver of immunity itself, which must be 'unequivocally expressed' . . . 'this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'" *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981) (citations omitted) (considering whether express waiver of sovereign immunity in ADEA also included express waiver of immunity from right to jury trial); *United States v. Williams*, 514 U.S. 527, 531 (1995) (construing scope of express waiver of Federal Government's sovereign immunity to determine whether statute authorized tax refund suit); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (considering whether express waiver of immunity from suit in the Court of Claims Act included express consent by

Congress to waive traditional immunity from interest); *see also United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947).

In *Lane v. Pena*, 518 U.S. 187 (1996), this Court applied settled doctrine governing the express consent requirement and considered whether Congress unequivocally waived the Federal Government's sovereign immunity from monetary damages. At issue in *Lane* was the scope of the waiver: "[A] waiver of the [Federal] Government's sovereign immunity will be strictly construed, *in terms of its scope*, in favor of the sovereign." *Id.* at 192 (emphasis added). This Court stated: "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.*; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (applying traditional rule that Federal Government's consent to suit must be construed strictly and in favor of the sovereign).

Finding that the statutory text did not unambiguously extend to monetary damages from federal defendants, this Court refused to expand the scope of the express waiver. *Lane*, 518 U.S. at 196-97. This Court expressly recognized the unique status the United States enjoys with respect to immunity from suit and, in rejecting the wholesale application of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), expressly noted that while nonfederal defendants may be subject to all appropriate remedies (including monetary damages) arising from a cognizable cause of action, the Federal Government stands on entirely different footing. Thus, in keeping

with the rule that not only the waiver of sovereign immunity itself but also the terms and scope of the Federal Government's consent to suit must be unequivocally expressed, this Court held that "'[w]here a cause of action is authorized against the federal government, the available remedies are not those that are "appropriate," but only those for which sovereign immunity has been expressly waived.'" *Id.* at 197.

By its terms, *Lane* involves only the Federal Government's sovereign immunity. Nothing in *Lane* or any other decision of this Court purports to extend the strict requirement that consent to be sued must extend expressly and unambiguously not only to the waiver of immunity but also to the scope of available remedies beyond the context of the United States' sovereign immunity. Nothing in *Lane* or any other decision of this Court purports to import this strict standard into the Eleventh Amendment or Spending Clause contexts. That is because federal sovereign immunity and the Eleventh Amendment are distinct constructs.

Indeed, just as *Franklin* had no application in the sovereign immunity context, this Court has expressly rejected the contention that cases governing waiver of the United States' sovereign immunity apply with equal force to the Eleventh Amendment or govern a state's voluntary consent to federal court jurisdiction. *See Lapides v. Bd. of Regents of the Univ. Sys. Of Ga.*, 535 U.S. 613, 623 (2002) (rejecting reliance on cases involving the United States' waiver of immunity where cases did "not involve the Eleventh Amendment -- a specific text with a history that focuses on the State's sovereignty vis-à-vis the Federal Government.");

compare Nordic Village, 503 U.S. at 33 (noting that finding of Eleventh Amendment immunity does not necessarily confer immunity on United States).

This Court applies a different set of rules to determine whether the Eleventh Amendment applies and whether immunity has been constitutionally abrogated or a state has expressly consented to suit; and a different set of rules still to determine whether a state has knowingly and voluntarily waived its Eleventh Amendment immunity by accepting federal funds pursuant to valid Spending Clause legislation. Even if the States' consent to suit or Congressional abrogation of non-consenting States' immunity requires an unequivocal express reference to monetary damages, the test for whether a state, through its affirmative conduct, knowingly and voluntarily accepts the conditions of Spending Clause legislation requires no express statutory reference to monetary relief.

"We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). In considering whether funding recipients have consented to suit, the touchstone is not unequivocal expression in statutory text; it is notice. "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the "contract." . . . Accordingly, if

Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

The contract analogy applies with equal force to the scope of remedies available for breach of substantive Spending Clause conditions. *Id.* at 187 ("The same analogy applies, we think, in determining the *scope* of damages remedies.") (emphasis in original). Thus, in construing the scope of damages (and therefore, necessarily, waiver of immunity) available under Title IX, this Court, in *Barnes*, relied on *Franklin*, and not on *Lane*, to find that, given the contractual nature of the statute, "appropriate relief" including compensatory damages is available "if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* This Court expressly rejected a rule, like the one in *Lane*, that would require an express reference to monetary damages in Spending Clause legislation: "A funding recipient is generally on notice that it is subject *not only to those remedies explicitly provided* in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.* (emphasis added). Thus, even in Spending Clause legislation that contains no express reference to remedies whatsoever, this Court has recognized a right to compensatory damages. *See id.*

Barnes is not the only case in which this Court has recognized the distinct nature of voluntary Eleventh Amendment waivers in the Spending Clause context. *See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 n.2 (1999)

("[C]onditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful . . . activity."); *id.* at 686 (distinguishing waivers of immunity in Spending Clause legislation as "fundamentally different" in that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions."); *compare Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (mere participation in federal program is insufficient to effect waiver absent Congress' manifestation of "clear intent to condition participation . . . on the State's consent to waive its constitutional immunity."); *Lapides*, 535 U.S. at 619-23 (distinguishing voluntary conduct from intent and finding state waived immunity by voluntarily invoking federal court jurisdiction).

Here, that Congress unambiguously conditioned the voluntary acceptance of federal funds on the States' compliance with RLUIPA's substantive provisions and their consent to be sued by private parties in federal court is not seriously in dispute. The question here is whether Congress was also required to unequivocally and expressly reference monetary damages or whether, once a waiver of immunity has been secured, the *scope of available remedies*, including monetary relief, is governed by *Franklin* and *Barnes*.[1]

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[1] Respondents contend that *Lane's* rejection of *Franklin* applies equally to matters implicating state sovereignty, and that *Barnes*

The Eighth Circuit and the other courts of appeals it followed have profoundly erred in conflating this Court's treatment of sovereign and Eleventh Amendment immunity, and in replacing the clear notice requirement applicable to Spending Clause conditions with the most stringent test this Court applies to ascertain the United States' express consent to be sued. In so doing, the Eighth Circuit has disregarded the unique nature of Spending Clause legislation and the *voluntary* relationship it creates between the States and the Federal Government, and has created two disparate standards for federal funding conditions—one for substantive conditions and another, heightened one for waivers of immunity.

This analytic error, which has now become entrenched among the courts of appeals, cannot stand. The courts of appeals have compounded the error by fundamentally misconstruing and applying this Court's decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998). *See e.g.*, *Holley v. California Dep't of Corr.*, 599 F.3d 1108, 1111-12 & n.3 (9th Cir. 2010); *Nelson v. Miller*, 570 F.3d 868, 883-85 (7th Cir. 2009); *Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006). *Deep Sea* did not remotely purport to conflate

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is inapposite because it did not involve immunity. BIO 3-4. Respondents' criticism begs the question whether *Lane's* "unequivocal expression" requirement applies in the Eleventh Amendment and Spending Clause contexts. *Barnes* governs the scope of remedies, including damages, available against federal funding recipients for violations of Spending Clause legislation, and makes no exception for States.

the standards governing Federal sovereign and Eleventh Amendment immunity. That case involved the narrow question whether the Eleventh Amendment applies to bar federal jurisdiction over *in rem* admiralty actions where the State is not in possession of the property. *Deep Sea*, 523 U.S. at 507.

This Court stated that, for *purposes of determining whether immunity turns on possession of the property*, "this Court's decisions in cases involving the sovereign immunity of the Federal Government in *in rem* admiralty actions provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to the States and the Federal Government." *Id.* at 506-07 (discussing analogous *in rem* cases where state, federal or foreign governments assert ownership and immunity turns on possession). *Deep Sea* involved the threshold question of whether the Eleventh Amendment even applies where a State is not in possession; it did not involve voluntary waiver, express consent or abrogation of the States' immunity.

Even so, correlation is not equivalence, and this fundamental error, which implicates all Spending Clause legislation, should not be allowed to persist.[2]

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[2] *Hoffman v. Conn. Dep't of Income Maintenance*, 492 U.S. 96, 104 (1989), is not to the contrary, as it involved express abrogation.

II. The Eighth Circuit's Refusal To Recognize RLUIPA As A Statute Prohibiting Discrimination Is Fundamentally Wrong.

Respondents contend that RLUIPA is not a statute prohibiting discrimination under CRREA because it does not contain an unequivocal textual reference to discrimination. BIO 4-5. But the Eighth Circuit's error was precisely in its demand that RLUIPA expressly employ the term "discrimination." Again, in importing the kind of stringent textual requirements that typically apply to consent and abrogation and to express waivers of the Federal Government's sovereign immunity, the Eighth Circuit raised the bar on Congress' ability to condition federal funds in Spending Clause legislation without justification.

RLUIPA unambiguously prohibits at least intentional discrimination and much more—including facially neutral but substantially burdensome rules of general applicability. To suggest that RLUIPA applies to nondiscriminatory substantial burdens but offers no remedy for intentionally discriminatory burdens on religious exercise is to ignore the stated purpose of RLUIPA and to defy common sense. Modeled on analogous Spending Clause legislation aimed at eradicating discrimination in federal funding programs, RLUIPA is expressly designed to confer heightened standards for religious free exercise more rigorous than what the Constitution requires. To the extent the First Amendment prohibits intentional discrimination, and RLUIPA protects against even more, Section 3 necessarily prohibits discrimination. *See Employment Div. v. Smith*, 494 U.S. 872, 885-86, 886 n.3 (1990).

Given the strict scrutiny RLUIPA demands in order to justify substantially burdensome prison regulations, it is not reasonable to conclude that States that accept federal funds are unaware that they must refrain from discrimination, intentional or otherwise.

Section 3 of RLUIPA need not include the term "discrimination" in order to unambiguously prohibit discrimination, and to put the States on notice that by accepting federal funds they agree to refrain from discrimination against religious exercise. CRREA by its terms applies to *any statute prohibiting discrimination*, and does not require an express textual reference to that term. 42 U.S.C. § 2000d-7(a). This Court has expressly recognized that "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment," and that by using that broad term, Congress gives a statute a "broad reach." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

Discrimination manifests in many forms and Congress is not required to use magic words, so long as its intent is plain. *See id.* at 172-74 (retaliation is form of discrimination); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649-51 (1999) (deliberate indifference is form of discrimination); *see also Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1936-37 (2008) (broad antidiscrimination statute plainly prohibited retaliation); *CBOCS W., Inc. v. Humphries*, 128 S.Ct. 1951, 1960-62 (2008) (failure to explicitly reference retaliation does not reflect intent to exclude it).

Under Title VII, discrimination includes both disparate treatment and disparate impact *without*

regard to discriminatory intent. The question is not whether the conduct was intentionally discriminatory but whether the government had a lawful justification. *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-77 (2009). Further, unjustified refusals to reasonably accommodate constitute discrimination. 42 U.S.C. §§ 2000e-2(a), 2000e(j). Here, too, substantial burdens imposed on the basis of religion without a legitimate, *neutral* justification plainly constitute discrimination, even if unintentional.

Under the Rehabilitation Act, discrimination is expressly defined to include "exclusion from participation in," or "deni[al] [of] the benefits of" federally funded programs, *without regard to unequal treatment or discriminatory intent.* 28 C.F.R. §§ 41.51(a), (b)(1)(i), (vi), (vii), (b)(3)(ii), (b)(4)(i)-(ii). The unjustified failure to reasonably accommodate is a prohibited discriminatory practice. 28 C.F.R. § 41.53.

Finally, CRREA was enacted in response to this Court's holding that Congress failed to unmistakably express its intent to abrogate Eleventh Amendment immunity. *Lane*, 518 U.S. at 198. CRREA thus abrogates immunity for the enumerated statutes. That CRREA is sufficiently unequivocal to abrogate immunity for the enumerated statutes says nothing about whether it manifests sufficiently clear intent to condition federal funds on States' voluntary waiver of immunity for un-enumerated laws, like RLUIPA.[3]

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[3] Respondents suggest CRREA alone does not warrant review. BIO 5. However, CRREA was raised as a separate question

The absence of a textual reference to "discrimination" does not render CRREA ambiguous. States have notice sufficient for them to knowingly and voluntarily accept federal funds fully cognizant of the consequences of their participation—namely, that they will be subject to RLUIPA's heightened protections and subject to suit in federal court for breach.[4]

CONCLUSION

For these reasons, the petition should be granted.

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Respectfully submitted,

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presented, Pet. at ii, 32-39, and the courts below considered CRREA independently, Pet. App. 27a-30a, 70a-72a.

[4] That Section 2 expressly references discrimination does not render Section 3 ambiguous. Section 3's broad prohibition against all substantially burdensome prison regulations necessarily includes intentionally discriminatory and facially neutral laws. Section 2 provides additional protection against discriminatory land use laws, *even if they do not impose a substantial burden.*